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REPORT
101-349

EMPLOYEE HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT

JUNE 28 (legislative day, JUNE 11), 1990.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 436]

The Committee on Labor and Human Resources, to which was referred the bill (S. 436) to strengthen the protections available to employees against reprisals for disclosing information, to protect the public health and safety, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

CONTENTS

		Page
I.	Summary of the bill	8
II.	Background and need for legislation	9
III.	History of the legislation	33
IV.	Hearings	33
V.	Committee views	34
VI.	Votes in Committee	51
VII.	Cost estimate	52
VIII.	Regulatory impact statement	53
IX.	Section-by-section analysis	54
X.	Minority views	61

The amendment is as follows:

Strike all after the enacting clause and insert the following:

S543-1D

SECTION 1. SHORT TITLE.

This Act may be cited as the "Employee Health and Safety Whistleblower Protection Act".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) employees who report unlawful or hazardous activities are performing an important public service by helping ensure the health and safety of workers and the general public;

(2) employees should be able to report unlawful or hazardous activities without fear of reprisal; and

(3) employees who make such reports are not adequately protected against reprisal by the current Federal laws designed to protect private sector whistleblowers.

(b) PURPOSE.—The purpose of this Act is to strengthen and improve protection for employees who report unlawful or hazardous activities, to prevent retaliation against employees, and to improve the health and safety of workers and the general public by—

(1) extending whistleblower protection regarding health and safety matters to all employees not currently protected by Federal law;

(2) creating a uniform statute of limitations for all whistleblower complaints by private sector employees;

(3) ensuring that the Secretary of Labor has subpoena power to investigate whistleblower complaints;

(4) providing for a limited private right of action for certain whistleblower complaints; and

(5) ensuring that reports of unlawful or hazardous activities are referred to the appropriate Federal agencies for investigation.

SEC. 3. DEFINITIONS.

As used in this Act—

(1) COMMERCE.—The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof.

(2) EMPLOYEE.—The term "employee" means any individual who is employed by an employer, or who is a former employee of an employer, to the extent that—

(A) such individual is discharged or discriminated against for any of the conduct described in section 4; and

(B) no remedy is available to such individual for such discharge or discrimination under an existing Federal whistleblower protection law.

(3) EMPLOYER.—The term "employer"—

(A) means a person engaged in a business affecting commerce who has employees;

(B) includes—

(i) a State or political subdivision of a State, or an interstate governmental agency; and

(ii) an agent of an employer and an employer of an employer; and

(C) does not include the United States, except for a government corporation (as defined in section 103(1) of title 5, United States Code) and the United States Postal Service.

(4) EXISTING FEDERAL WHISTLEBLOWER PROTECTION LAW.—The term "existing Federal whistleblower protection law" means those provisions of Federal law that protect employees against discharge or discrimination for any of the conduct described in section 4, that are contained in—

(A) section 942 of Department of Defense Authorization Act of 1987 (10 U.S.C. 2409);

(B) section 23 of the Toxic Substances Control Act (15 U.S.C. 2622);

(C) section 211 of the Asbestos Hazard Emergency Response Act of 1986 (15 U.S.C. 2651);

(D) section 11(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660(c));

(E) section 505(a) of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1855(a));

(F) section 105(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 815(c));

(G) section 703 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1293);

(H) section 507 of the Federal Water Pollution Control Act (33 U.S.C. 1367);

(I) section 1450 of the Public Health Service Act (42 U.S.C. 300j-9);

(J) section 210 of the Energy Reorganization Act of 1974 (42 U.S.C. 5851);

(K) section 7001 of the Solid Waste Disposal Act (42 U.S.C. 6971);

(L) section 322 of the Clean Air Act (42 U.S.C. 7622);

(M) section 110 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9610);

(N) section 212 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 441);

(O) section 7 of the International Safe Container Act (46 U.S.C. 1506); or

(P) section 405 of the Surface Transportation Assistance Act of 1982 (49 U.S.C. App. 2305).

(5) FEDERAL AGENCY.—The term "Federal agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, or any interstate governmental agency or commission. For purposes of section 4, the term includes each authority of the Government of a State or a political subdivision of a State that administers or enforces a Federal health or safety law.

(6) FEDERAL HEALTH OR SAFETY LAW.—The term "Federal health or safety law" means any Federal law, or any portion thereof, including any Federal regulation, rule, or order implementing such law or portion thereof, a primary purpose or effect of which is to create or establish or authorize the creation or establishment of health or safety standards. The term includes a State law, regulation, rule, or order, enacted as part of a State plan established to carry out a Federal health or safety law.

(7) INVESTIGATION OFFICE.—The term "investigation office" means the office or unit created or designated within the Department of Labor pursuant to section 5(c)(1).

(8) PERSON.—The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons, but does not include the United States, except for a Government corporation (as defined in section 103(1) of title 5, United States Code) and the United States Postal Service.

(9) PROCEEDING.—The term "proceeding" means a trial, hearing, investigation, inquiry, inspection, administrative rulemaking, or adjudication involving a Federal agency.

(10) RESPONDENT.—The term "respondent" means a person named in a complaint as a respondent.

(11) SECRETARY.—The term "Secretary" means the Secretary of Labor.

(12) STATE.—The term "State" means a State of the United States, the District of Columbia, Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, or any other Territory or possession of the United States.

SEC. 4. EMPLOYEE PROTECTION.

(a) IN GENERAL.—No person shall discharge or in any other manner discriminate against any employee because the employee—

(1) discloses, or demonstrates an intent to disclose, an activity, policy, or practice that the employee believes evidences a violation of a Federal health or safety law;

(2) initiates, assists, participates, or demonstrates an intent to initiate, assist, or participate, in a proceeding with respect to—

(A) an activity, policy, or practice that the employee believes evidences a violation of a Federal health or safety law;

(B) enactment, adoption, promulgation, issuance, or amendment of a Federal health or safety law; or

(C) administration or enforcement of a Federal health or safety law or of this Act; or

(3) refuses to participate in an activity, policy, or practice when—

(A) such participation constitutes a violation of a Federal health or safety law; or

(B)(i) the employee has a reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation;

(ii) the activity, policy, or practice causing the employee's apprehension of such injury is of such a nature that a reasonable person, under the circum-

stances then confronting the employee, would conclude there is a bona fide danger of an accident, injury, or serious impairment of health or safety, resulting from participation in the activity, policy, or practice; and

(C) before refusing to participate in an activity, policy, or practice under subparagraph (A) or (B), the employee, where possible, must have sought and been unable to obtain a correction of the violation or of the dangerous activity, policy, or practice.

(b) WAIVER.—Except as provided in section 5(l) or pursuant to any court supervised settlement agreement, an agreement by an employee, express or implied, written or oral, purporting to waive or modify the rights of the employee under this Act shall be void as contrary to public policy.

(c) EXEMPTION.—This Act shall not apply under circumstances where an employee acted without direction from the employee's employer, deliberately causing a violation of a Federal health or safety law.

SEC. 5. REMEDY.

(a) STATUTE OF LIMITATIONS.—The statute of limitations for filing a complaint pursuant to this Act or an existing Federal whistleblower protection law shall be 180 days after the later of the date—

(1) an alleged violation occurs;

(2) the discharge or other discrimination has taken effect; or

(3) the employee first learns or reasonably should have learned of the violation.

(b) COMPLAINT.—

(1) FILING.—Any employee who believes the employee has been discharged or otherwise discriminated against by any person in violation of section 4 may, within the period prescribed in subsection (a), file (or have filed by any person on the employee's behalf) a complaint with the Secretary alleging such violation. Except as provided in section 4(a)(3)(C), the complaint may be filed without regard to exhaustion of any other remedies.

(2) COPY.—On receipt of a complaint, the Secretary shall cause a copy of the complaint to be served on the respondent and on any Federal agency that may have jurisdiction over the activity, policy, or practice alleged in the complaint.

(3) UNIFORM FILING.—A person shall be considered to have complied with the statute of limitations for this Act or for an existing Federal whistleblower protection law if that person files a complaint with the Secretary within the period prescribed in subsection (a). If the Secretary does not have the authority to conduct investigations or hearings regarding a complaint filed under this subsection, the Secretary shall refer the complaint immediately to the appropriate Federal agency.

(c) INVESTIGATION.—

(1) ADMINISTRATIVE PROVISIONS.—The Secretary shall create or designate an identifiable office or unit within the Department of Labor that shall be responsible for investigation of complaints filed under subsection (b). The Secretary shall refer all such complaints immediately to the investigation office.

(2) IN GENERAL.—Within 60 days of the receipt of a complaint filed under subsection (b), the investigation office shall conduct an investigation, determine whether there is reasonable cause to believe the complaint has merit, and make findings of fact. If there is reasonable cause to believe a violation of this Act has occurred, the investigation office shall accompany the findings of fact with a preliminary order providing the relief prescribed by subsection (i), including immediate reinstatement of the employee pending a final order on the complaint.

(3) HEARING.—The findings and any preliminary order issued by the investigation office shall be served on all parties to the investigation and shall include a statement of the right of any party to request a hearing pursuant to subsection (d). Where a hearing is not timely requested, the findings and any preliminary order issued by the investigation office shall be deemed the final order of the Secretary and shall not be subject to judicial review.

(4) HEARING PROCEDURE.—In all hearings conducted under this Act, once the complainant has established by a preponderance of the evidence that an activity protected by this Act was a contributing factor in the alleged discharge or discrimination, the burden of proof shall be on the respondent to prove by clear and convincing evidence that the alleged discharge or discrimination would have occurred even if the employee had not engaged in activities protected by this Act.

(d) HEARING REQUEST.—

(1) TIMING.—The complainant or the respondent may request a hearing before an administrative law judge—

(A) within 30 days of receipt of the findings or preliminary order of the investigation office; or

(B) if no findings have been issued on or before the 60th day of receipt of the complaint, within 30 days thereafter.

(2) JURISDICTION.—The jurisdiction of the investigation office to make findings or issue a preliminary order shall cease on the filing of a request by the complainant for a hearing or the expiration of the period for filing such a request, whichever occurs first. Once the investigation office has lost jurisdiction to make findings or issue a preliminary order, any investigative material compiled by the investigating office in connection with the investigation shall be made available to the complainant or the respondent on request, subject to section 552a of title 5, United States Code.

(3) FILING WITH DEPARTMENT.—Any request for a hearing shall be filed with the investigation office. The investigation office shall file the request with the Office of Administrative Law Judges in the Department of Labor within 5 days of receipt.

(4) NO STAY OF REINSTATEMENT.—Such a request shall not operate to stay any reinstatement remedy contained in a preliminary order issued by the investigation office.

(5) NO FINDINGS.—If the investigation office has failed to make findings within the time period prescribed, the complainant may include in the hearing request a request to the administrative law judge for a preliminary order for immediate reinstatement.

(e) INTERVENTION.—

(1) VIOLATION DETERMINED BY INVESTIGATION OFFICE.—If the investigation office has determined there has been a violation of section 4, the investigation office shall intervene on behalf of the complainant in the proceedings authorized under this section.

(2) VIOLATION NOT DETERMINED.—In all other cases, within 15 days after receipt of a request for a hearing, the investigation office shall make a determination in writing whether, in its discretion, to intervene on behalf of the complainant.

(3) REPRESENTATION.—Such determination or the intervention by the investigation office shall not preclude the complainant or any other person on behalf of the complainant from representing the complainant in the proceedings authorized under this section.

(f) SUBPOENA AND RULEMAKING.—

(1) SUBPOENA POWER.—For purposes of any hearing or investigation provided for in this Act, or any hearing or investigation conducted pursuant to an existing Federal whistleblower protection law where the Secretary has authority to conduct investigations or hearings, the provisions of sections 9 and 10 (relating to attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act (15 U.S.C. 49 and 50) shall be applicable to the jurisdiction, powers, and duties of the Secretary.

(2) RULEMAKING AUTHORITY.—The Secretary shall promulgate such rules and regulations as may be appropriate to administer this Act, including any procedures for the voluntary use of alternative dispute resolution, such as mediation, fact-finding, mini-trials, and the use of settlement judges, for complaints pending under this Act as authorized in section 5(l)(2).

(g) HEARING PROCEDURE.—

(1) TIME FOR COMPLETION.—Any hearing requested pursuant to subsection (d) shall be conducted by an administrative law judge and completed within 180 days of receipt of the request for a hearing by the Office of Administrative Law Judges.

(2) NOTICE.—The parties shall have a reasonable opportunity for prehearing discovery and shall be given written notice of the time and place of the hearing at least 15 days prior to the hearing.

(3) ADMINISTRATIVE PROCEDURE.—The hearing shall be subject to the requirements of section 554 of title 5, United States Code.

(4) TRIAL DE NOVO.—The hearing shall be de novo, except that any preliminary order directing immediate reinstatement shall be enforceable.

(5) DECISION.—Within 60 days after the conclusion of the hearing on the record, or within 240 days after receipt of the hearing request by the investigation office, whichever is sooner, the administrative law judge shall issue a decision containing findings of fact, conclusions of law, and the remedy ordered, if

any. The decision shall be served on the Secretary and on all parties to the hearing and shall include a statement to the parties of their right to appeal.

(h) ADMINISTRATIVE APPEAL.—

(1) REVIEW.—Any decision issued pursuant to subsection (g) shall be the final order of the Secretary subject to judicial review pursuant to subsection (k) unless a party petitions the Secretary for review or the Secretary issues an order of review within 30 days after the issuance of the decision.

(2) TIME FOR REVIEW.—Within 60 days after receipt of the petition for review or issuance of an order of review, the Secretary shall issue a final order, based on the record and the decision of the administrative law judge, which shall be served on all parties. If the Secretary does not issue a final order within the period prescribed by this subsection, the decision of the administrative law judge shall become the final order of the Secretary.

(i) REMEDIES.—

(1) IN GENERAL.—If, in response to a complaint filed under subsection (b), the Secretary, investigation office, or administrative law judge determines that a violation of this Act occurred, the Secretary, investigation office, or administrative law judge shall order—

(A) the person who committed the violation to take affirmative action to abate the violation;

(B) such person to reinstate the complainant to the complainant's former position, if reinstatement is sought, together with compensation, including back pay and lost benefits, terms, conditions, and privileges of the complainant's employment;

(C) compensatory damages; and

(D) such equitable relief as is necessary to correct any violation of this Act or to make the complainant whole.

(2) COSTS.—On the issuance or designation of a final order of the Secretary sustaining the complainant's complaint, the Secretary, at the request of the complainant, may assess against the respondent a sum equal to aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for or in connection with, the bringing of the complaint on which the order was issued.

(j) PRIVATE RIGHT OF ACTION.—

(1) IN GENERAL.—If no decision by an administrative law judge is issued within the period prescribed by subsection (g), the complainant may file a civil action against the respondent within 60 days for damages and declaratory and equitable relief in any district court of the United States having jurisdiction over the parties, without regard to the amount in controversy, the citizenship of the parties, or further exhaustion of any administrative remedies provided in this Act, except that the court shall not take jurisdiction if the decision of the administrative law judge is issued before the filing of any civil action. The complainant may not file a civil action against the respondent under this subsection once the filing period has expired.

(2) LOSS OF JURISDICTION.—The jurisdiction of the Administrative Law Judge and the Secretary shall cease upon the filing of such civil action. The filing of such civil action shall not operate to stay any preliminary orders, including any orders for immediate reinstatement, issued by the investigation office or by the administrative law judge, unless otherwise ordered by the court.

(3) NOTICE.—On expiration of the period prescribed by subsection (g), the Secretary shall notify the complainant of the opportunity to file a civil action pursuant to this subsection.

(4) COSTS.—On the issuance or designation of a final order of the court sustaining the complainant's complaint, the court, at the request of the complainant, may assess against the respondent a sum equal to aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the court, by the complainant for or in connection with, the bringing of the complaint on which the order was issued.

(5) EVIDENTIARY RECORD.—If the complainant files a civil action within the period prescribed in this subsection, either party to that action may request that the Administrative Law Judge provide the complete evidentiary record compiled during the administrative hearing to the district court. Provision of the evidentiary record shall not preclude either party from supplementing the record before the district court.

(k) JUDICIAL REVIEW.—Any person adversely affected or aggrieved by a final order issued pursuant to subsection (h) may obtain review of the order in the United States court of appeals for the circuit in which the violation allegedly occurred. The

petition for review must be filed within 60 days after the issuance or designation of the final order. The review shall be conducted in accordance with chapter 7 of title 5, United States Code. The filing of a petition for review under this subsection shall not, unless ordered in accordance with the Federal Rules of Appellate Procedure, operate as a stay of the order. A final order of the Secretary with respect to which review could have been obtained under this paragraph shall not be subject to judicial review in any criminal or other civil proceeding.

(l) SETTLEMENT OR ALTERNATIVE DISPUTE RESOLUTION.—

(1) SETTLEMENT.—On receipt of a complaint pursuant to subsection (b), the investigation office shall attempt to reach a settlement between the complainant and the respondent. The Secretary, investigation office, or administrative law judge shall not enter into a settlement terminating a proceeding without the participation and written consent of the complainant. Any settlement order issued pursuant to this subsection (including any settlement reached through the use of alternative dispute resolution, as described in paragraph (2)) shall be a final order of the Secretary and shall include findings that the settlement is fair, adequate, reasonable, and in the public interest.

(2) ALTERNATIVE DISPUTE RESOLUTION.—While the complaint is pending within the Department of Labor, the Secretary may use alternative means of dispute resolution to resolve the complaint. The use of alternative dispute resolution, as well as the method of the alternative dispute resolution, shall be agreed to in writing by the parties before the Secretary may employ alternative dispute resolution. Absent the written agreement of all parties, documents exchanged, evidence of conduct, statements made, or any determinations or resolutions reached during the process of alternative dispute resolution shall not be discoverable or admissible in any proceedings under this Act. The parties may employ more than one method of alternative dispute resolution during the course of proceedings under this Act, but the use of alternative dispute resolution shall be limited to 30 days and shall toll the running of any time limits under this Act.

(m) TIME COMPUTATIONS.—Except as otherwise provided in this Act, for purposes of a proceeding on a complaint, all time computations shall be made in accordance with the Federal Rules of Civil Procedure.

(n) POSTING.—Each employer subject to this Act shall post and keep posted in conspicuous places on its premises a notice to be prepared or approved by the Secretary setting forth such information as the Secretary considers appropriate to effectuate the purposes of this Act.

SEC. 6. ENFORCEMENT.

(a) BY THE SECRETARY.—Whenever a person has failed to comply with an order issued under this Act, the Secretary may file a civil action in the United States district court for the district in which the violation is alleged to have occurred to enforce such order. In an action brought under this subsection, the district court shall have jurisdiction to grant all appropriate relief, including injunctive and declaratory relief and compensatory and exemplary damages.

(b) BY THE PARTIES.—Any person on whose behalf an order is issued pursuant to this Act may commence a civil action against the person named in the order to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order. On issuance of an order on behalf of any person seeking enforcement under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the person seeking enforcement.

SEC. 7. COMPLAINT REFERRAL.

(a) REFERRAL.—On issuance of a final order (including an order approving a settlement pursuant to section 5(l)) by the Secretary, investigation office, or administrative law judge, the Secretary shall cause a copy of such order, but only the relevant portions of a settlement order, to be served on each Federal agency that may have jurisdiction over the activity, policy, or practice alleged in the complaint. Any such Federal agency shall take appropriate action with respect to the activity, policy, or practice. Within 30 days after taking such action any Federal agency shall inform the parties to the complaint filed under section 5(b) of any action taken and shall inform the relevant committees of Congress. If appropriate, the Federal agency shall inform the parties and Congress in the form of a report.

(b) OTHER INVESTIGATIVE AUTHORITY.—Subject to section 8, nothing in this section shall limit the authority of any Federal agency under any other law.

SEC. 8. EFFECT ON OTHER RIGHTS AND REMEDIES.

(a) FEDERAL RIGHTS AND REMEDIES.—It is the express intent of Congress to supersede an existing Federal whistleblower protection law only insofar as such law—

(1) may provide a statute of limitations for filing complaints that is less than 180 days; and

(2) does not authorize subpoena power for the Secretary as provided in section 5(f).

(b) STATE RIGHTS AND REMEDIES.—The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other rights and remedies of the employees provided under State law, and are not intended to alter or effect such rights and remedies.

(c) CONTRACTUAL RIGHTS AND REMEDIES.—The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual rights and remedies of the employees, and are not intended to alter or effect such rights and remedies.

SEC. 9. EFFECTIVE DATE.

(a) EFFECTIVE DATE.—This Act shall become effective on the date of enactment.

(b) PENDING CASES.—This Act shall apply only to those complaints filed on or after the effective date of this Act.

I. SUMMARY OF THE BILL

S. 436, the Employee Health and Safety Whistleblower Protection Act, ensures that federal statutory protections are available to workers who are discriminated against for "blowing the whistle" on federal health and safety violations. The legislation is designed to provide an effective remedy against employer retaliatory conduct so as to encourage workers to cooperate with federal government efforts to protect public health and safety.

The Employee Health and Safety Whistleblower Protection Act would improve the current federal protection system by (1) closing existing gaps in coverage so that employees in all industries subject to federal health and safety regulations are protected; (2) creating a uniform 180-day statute of limitations so that whistleblowers will have adequate time to file a complaint; (3) expressly providing subpoena power to the Secretary of Labor to ensure effective investigation of complaints; and (4) ensuring that the underlying safety or health problems exposed by the whistleblower are referred to the appropriate federal agency for further investigation.

The bill protects primarily those employees whose actions are not otherwise protected by existing federal whistleblower statutes. For that limited class of employees, the Act prohibits discrimination against an employee who (1) discloses an activity the employee believes evidences a violation of a federal health and safety law; (2) initiates, assists or participates in a federal proceeding relating to a federal health and safety law; or (3) refuses to participate in an activity when such participation violates a federal health and safety law or where the employee has reasonable apprehension of serious injury to the employee or the public due to the participation.

S. 436 affects private sector whistleblowers [1] who are protected under existing law in several limited ways. The bill establishes a uniform 180-day statute of limitations to provide adequate time to file a complaint. The legislation seeks to reduce confusion by allow-

[1] Throughout this report, reference will be made to "private sector whistleblowers" or to "private sector employees." For purposes of this report, those terms include workers employed by private employers as well as those individuals employed by state or local governments. When this report refers to "public" employees, that term relates to employees of the United States.

ing whistleblowers to file all initial complaints with the Secretary of Labor. In addition, the bill expressly provides the Secretary of Labor with enforceable subpoena powers to investigate whistleblower complaints within the Secretary's jurisdiction more effectively.

Regarding protection for whistleblowers who have no other remedy under existing federal whistleblower laws, the bill creates an adminsistrative procedure in the Department of Labor. All complaints would be investigated initially by the Department. After the investigation, any party could request a full hearing on the record before an administrative law judge within the Department. The bill clarifies each party's burden of proof for an evidentiary hearing by adopting the indentical standard incorporated in the Whistleblower Protection Act of 1989, as signed into law in April 1989 (P.L. 101-12, 103 Stat. 16-35). The Secretary of Labor has discretion to review a decision by the hearing officer and any party has the opportunity to appeal the Secretary's decision to the court of appeals.

The bill includes specific time limits at each stage of the procedure to ensure expeditious consideration of the complaint. If the Department of Labor fails to issue a final decision within the prescribed period, the employee may then, and only then, bring a civil action seeking protection. The bill provides for standard "make whole" remedies. It also encourages settlement through the use of alternative dispute resolution mechanisms. In addition, copies of complaints and final decisions are fowarded to the appropriate federal agency for further investigation of the substantive health or safety violations uncovered by the whistleblower.

The Employee Health and Safety Whistleblower Protection Act provides rights and remedies that are in addition to, not in lieu of, other rights and remedies provided under state law or under contract. The bill has no retroactive effect and applies only to complaints pending on or after the date of enactment.

II. BACKGROUND AND NEED FOR LEGISLATION

A. Introduction

The Employee Health and Safety Whistleblower Protection Act (the "Act") is based on a straightforward, guiding principle: any activity that justifies federal regulation to protect health or safety also warrants protection for whistleblowers who seek to ensure compliance with the underlying federal regulations. The federal government has primary responsibility for enforcing federal laws. Private citizens, however, can and do play a significant role in aiding federal enforcement efforts. In particular, as indicated in testimony before the Labor Subcommittee, federal health and safety enforcement relies heavily on private citizens serving as watchdogs for the government. See e.g., Employee Health and Safety Whistleblower Protection Act: Hearing on S. 436 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 101st Cong. 1st Sess. 50 (1989) (Federal Aviation Administration works on a "designee system" where employees are "watchdogs within the system") [hereinafter cited as "S. 436 Hearing"].

But private citizens will continue to be reluctant to assist health and safety enforcement efforts if they know that they may be punished for providing such assistance. That is why we need laws to protect people who "blow the whistle" on health or safety violations. Under the "employment-at-will" doctrine, either party in an employment relationship is free to terminate the relationship at any time for any reason or no reason at all. A strict application of that doctrine would allow an employer to retaliate against an employee who is seeking to further a recognized public purpose. Because this strict application of the employment-at-will doctrine could undermine more important public policy concerns, a majority of states have adopted some form of "public policy exception" to the doctrine. That exception provides that, notwithstanding the employment-at-will doctrine, employers may not terminate employees for conduct that furthers an established and recognized public purpose.

Whistleblower protection statutes help to implement the public policy exception. The statutes seek to strike a balance by reassuring potential whistleblowers that protections exist against retaliation, while ensuring employers that their legitimate employment actions will be sustained. More than a dozen federal statutes exist to protect workers from retaliation when they help enforce federal health and safety laws. The Administrative Conference of the United States has concluded:

> [S]o-called whistleblower statutes . . . serve[ ] the important public interest of helping ensure the health and safety of workers in the various regulated industries or activities, as well as that of the general public. The [existing federal whistleblower] statutes are intended to create an environment in which an individual can bring a hazardous or unlawful situation to the attention of the public or the governnment without fear of personal reprisal. Such disclosures can be a valuable source of information especially where the public lacks the knowledge or access to information necessary to be fully informed on these important issues.

Administrative Conference of the United States "Recommendation 87-2: Federal Protection of Private Sector Health and Whistleblowers" (June 11, 1987) [hereinafter cited as "ACUS Recommendation"], reprinted in S. 436 Hearing at 195.

Current federal whistleblower statutes, however, are full of gaps and inconsistencies. We therefore have a patchwork system where some workers are protected for participating in enforcement of federal health or safety laws, while others have no protection whatsoever.

B. Administrative conference report

The genesis of the Act is an in-depth study and subsequent report and recommendation by the Administrative Conference of the United States (ACUS). ACUS is a permanent, independent federal agency whose mission is to monitor the federal administrative process and make proposals for improvement in that process. In 1987, ACUS completed an extensive review of the existing federal

statutes protecting private sector health and safety whistleblowers. As part of that review, ACUS conducted a public hearing on October 1, 1986, and published the proposed recommendation in the Federal Register. The ACUS Committee on Adjudication approved the recommendation,[2] which was then submitted to and approved by the full ACUS Council in its plenary session. The official recommendation was adopted on June 11, 1987, subsequently published in the June 24, 1987 Federal Register (52 Fed. Reg. 23631), and codified as 1 CFR 305. 87-2. The ACUS recommendation concluded that as a result of "statutory incongruities, available procedures and protections may differ depending solely upon the industry to which an aggrieved employee belongs." ACUS Recommendation, reprinted in S. 436 Hearing at 196. Moreover, ACUS found that the statutory incongruities do "not appear to be reasoned, but most likely reflect[ ] the incremental enactment of the various statutes over a period of years." Id. at 197.

In the report accompanying Recommendation 87-2, ACUS' expert consultant declared that the "most obvious shortcoming of the current federal legislation protecting health and safety whistleblowers is the omission of major sectors of the economy where health and safety are unquestionably at stake." E. Fidell, "Federal Protection of Private Sector Health and Safety Whistleblowers: A Report to the Administrative Conference of the United States" (February 1987) [hereinafter cited as "ACUS Report"] reprinted in S. 436 Hearing at 116, 131. The existing gaps in coverage, like the other statutory incongruities, do not appear to be reasoned.

For example, truckers and truck mechanics are protected, but pilots, flight attendants, and airline mechanics are not. Seven environmental statutes, including the Superfund and Clean Air Acts, accord protections to whistleblowers. But workers reporting violations of environmental statutes dealing with such major concerns as noise pollution, ocean dumping and medical waste dumping have no protection from retaliation. Other examples highlight the irrationality of the current statutory scheme. Migrant farm workers have whistleblower protection, but presticide applicators at the same farms are unprotected. Commercial nuclear power plant workers have statutory protection, but workers at government-owned, contractor-operated (GOCO) nuclear weapons facilities have no such protection. Perhaps most glaring of all, workers in food processing, drug and medical device manufacturing and all forms of consumer product manufacturing—who are protected when their own safety or health is threatened—have no protection from retal-

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[2] The ACUS Committee on Adjudication reviewed a tentative recommendation prepared by a special consultant retained by ACUS, Mr. Eugene Fidell, an attorney in private practice in Washington, D.C. The ACUS Committee on Adjudication that review this recommendation had 22 members at the time, representing a broad cross-section of interests. The majority of members were top-ranking government lawyers, including the Legal Advisor at the Department of State, the General Counsel of the Commodity Futures Trading Commission, the Assistant General Counsel of the Department of Defense, and the Solicitor of the Federal Labor Relations Authority. Other government representatives included the Chairman of the Federal Trade Commission, the Chairman of the Federal Election Commission, the Chairman of the U.S. International Trade Commission, a Commissioner of the Securities and Exchange Commission, the Under Secretary of the Department of Health and Human Services, and a federal appeals court judge. The Committee included eight non-government members, including a law professor, several private practitioners, the General Counsel of the National Right to Work Legal Defense Foundation and the General Counsel of the Howard Hughes Medical Institute.

iation when they report threats to the health or safety of the public.

In addition to identifying what it termed "jurisdictional lacunae," ACUS recommended a series of procedural reforms that should be included in an omnibus federal whistleblower protection statute. First, ACUS called for centralized administration of whistleblower protection statutes within the Department of Labor, the agency with the most experience and expertise in processing whistleblower complaints under the existing federal whistleblower laws. ACUS also proposed the following specific procedural reforms: (1) a uniform definition of protected activity; (2) a uniform statute of limitations of not less than 180 days; (3) a uniform provision for remedies; (4) availability of alternative means of dispute resolution; (5) an opportunity for an administrative hearing with discretionary review by the Secretary of Labor, judicial review by the court of appeals and enforcement through the district court; (6) subpoena power for the Secretary of Labor; and (7) rulemaking authority for the Secretary of Labor. *See* ACUS Recommendation, reprinted in S. 436 Hearing at 199–200.

C. Scope of coverage

(1) Limitation to health and safety

The ACUS recommendation and report focused only on protection from discrimination that results from employees helping to enforce federal health or safety laws. ACUS did not address whistleblower protection for disclosures relating to waste, fraud or abuse. The scope of the ACUS recommendation and report is consistent with the thrust of the federal effort to protect whistleblowers. In large part, ACUS limited its study to health and safety enforcement because of the predominance of health and safety issues under existing federal whistleblower protection statutes. See ACUS Recommendations, reprinted in S. 436 Hearing at 195 and n.1.

Moreover, the focus on health and safety is consistent with the underlying rationale for the public policy exception to the at-will employment doctrine. That exception is narrowly drawn to protect workers who are furthering an established and recognized public purpose. Adding in the enforcement of established federal health and safety regulation is a recognized public purpose; indeed, it is incorporated as part of the federal enforcement system.

Within the universe of federal health and safety laws, there are numerous gaps in coverage for whistleblowers. Existing federal whistleblower protection statutes are divided into two broad categories: those laws that protect workers from retaliation when they further occupational health or safety and those laws that protect workers from retaliation when furthering public health and safety. There is a need to protect workers who blow the whistle on either occupational or public health or safety violations.

(2) Occupational health and safety

The gaps in coverage relating to occupational health and safety are relatively small. The Occupational Safety and Health ("OSH") Act provides for federal safety and health regulation of the workplace for the majority of American workers. Section 11(c) of the

OSH Act, 29 U.S.C. 660(c), provides for whistleblower protection for any employee who is helping to enforce OSH Act safety and health provisions. Therefore, any worker who complains about an OSH Act violation is protected already by section 11(C) and would not be covered for complaining about occupational safety and health violations under this Act. But section 4(b)(1) of the OSH Act provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

29 U.S.C. 653(b)(1).

As indicated by a Department of Labor report to Congress on the impact of section 4(b)(1), the purpose of the provision is to avoid duplication of employee safety and health regulation by the Occupational Safety and Health Administration (OSHA) and other federal agencies. Occupational Safety and Health Administration, "Significant Issues Concerning Section 4(b)(1) of the Occupational Safety and Health Act of 1970: Report Prepared at the Request of the Subcommittee on Health and Safety of the House of Representatives Committee on Education and Labor" (February 24, 1986) [hereinafter cited as "4(b)(1) Report"]. The effect of the provision, however, is to "limit the authority of OSHA to regulate those working conditions of employees which are subject to regulation by another federal agency." 4(b)(1) Report at 1. By limiting the authority of OSHA, section 4(b)(1) in practice also limits the scope of section 11(c), the OSH Act whistleblower protection provision. *See Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983) (section 4(b)(1) bars OSHA from acting under section 11(c) to protect employee whistleblowers where another agency has responsibility for substantive health or safety regulation, even though that other agency has no whistleblower protection regulation).

The gaps in whistleblower protection for occupational health and safety thus can be identified by examining those areas that are regulated by federal agencies other than OSHA. For example, occupational safety and health standards for railroad operations, interstate truck and bus operations, and mining are set by federal agencies other than OSHA. In the case of railroads, the Federal Railroad Administration under the Federal Railroad Safety Authorization Act, regulates workplace safety and health conditions. Section 212 of that Act, 45 U.S.C. 441, expressly provides for whistleblower protection for railroad employees. Thus there is no gap in coverage and no need to provide additional coverage for those railroad employees who "blow the whistle" on occupational safety and health violations. The same holds true for mining and interstate truck operations. The Mine Safety and Health Administration, acting pursuant to the Federal Mine Safety and Health Act, regulates health and safety in the mines. Section 105(c) of that Act, 30 U.S.C. 815(c), provides for whistleblower protection for mine workers. The Bureau of Motor Carrier Safety, pursuant to the Surface Transportation Assistance Act of 1982, regulates interstate truck and bus health and safety conditions. Section 405 of that Act, 49 App.

U.S.C. 2305, protects truck and bus operators from retaliation for furthering the purposes of that Act.

Gaps do exist, however, in other occupational areas not regulated by OSHA. For example, the Federal Aviation Administration (FAA) regulates occupational safety and health for flight crews, flight attendants, and airline maintenance and ground support personnel. *See Secretary of Labor* v. *Northwest Airlines, Inc.,* 8 BNA OSHC 1982 (R.C. 1980), (OSHA Review Commission unanimous decision upholding the FAA's authority to regulate working conditions for airline ground personnel). The FAA acts pursuant to the Federal Aviation Act of 1958, 49 App. U.S.C. 1301 et seq., but there is no provision for whistleblower protection in that Act. Thus there is no protection for aviation whistleblowers. They remain subject to retaliation for aiding in the enforcement of federal aviation safety provisions.

The federal courts have recognized the inequity of this situation. In *Pavolini* v. *Bard-Air Corp.,* 645 F.2d 144 (2d Cir. 1981), the court of appeals upheld the firing of a pilot who was discharged for reporting federal safety violations to the FAA. The court noted that it lacked jurisdiction because the federal statute did not provide for protection of aviation whistleblowers. But the court noted the need for a legislative solution to close this gap in coverage:

> We believe that it is unfortunate that a federal court cannot provide recourse to an employee fired for reporting violations of federal safety regulations . . . But we are mindful that we do not sit as a legislature . . . In view of what has occurred here, Congress may well wish to consider protecting in an appropriate way those who help prevent the loss of life from improper operation or maintenance of an aircraft.

645 F. 2d at 148. *See also Buethe* v. *Britt Airlines, Inc.,* 749 F. 2d 1235 (7th Cir. 1984) (no federal protection for aviation whistleblower); *Rachford* v. *Evergreen International Airlines, Inc.,* 596 F. Supp. 384, 386 (N.D. Ill. 1984) ("While it is perhaps lamentable that one who 'whistle blows' regarding such important matters as air safety should be discharged from his employment without a remedy under the Federal Aviation Act, Congress has not seen fit to protect employees from such retaliation.").

The 1986 Report by the Department of Labor to Congress on the application of section 4(b)(1) indicates there are other groups that lack coverage in addition to aviation. For example, occupational safety and health for a broad range of workers who use pesticides is governed by the Environmental Protection Agency, pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[3] There is no whistleblower protection provision in FIFRA. The same gap problem exists for employees on off-shore oil rigs (no whistleblower protection under the Outer Continental Shelf Lands Act);

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[3] FIFRA is generally considered an environmental statute, but according to the Department of Labor, its provisions have a direct bearing on occupational safety and health. *See* 4(b)(1) Report at 14. The fact that there is no whistleblower provision in FIFRA means that there is no protection for workers complaining either about occupational or public health and safety violations. The same analysis applies with regard to a number of statutes, including the Federal Aviation Act.

and workers involved in the operation of pipeline facilities relating to gas or hazardous liquids (no whistleblower protection under either the Natural Gas Pipeline Safety Act of 1968 or the Hazardous Liquid Pipeline Safety Act of 1979).

This listing of occupational whistleblower gap areas is designed to be illustrative, not exhaustive. The particular gaps may expand or contract depending on court interpretations of the scope of section 4(b)(1) of the OSH Act. But the method for determining whether an occupational whistleblower gap exists is settled: (1) determine whether OSHA regulates occupational safety and health for a particular industry; (2) if OSHA does regulate the industry, then there is no gap because section 11(c) protection already exists; (3) if OSHA does not regulate the industry, pursuant to section 4(b)(1), then review the statutory provision governing occupational safety and health regulation for that industry; (4) if that statute includes a whistleblower provision, then no gap exists; and (5) if that statute is silent regarding whistleblower protection, then there is a gap in coverage.

(3) Public health and safety

Significant gaps in coverage exist for whistleblowers who further the enforcement of public health and safety laws. For example, seven statutes primarily concerning with environmental protection include express whistleblower protection provisions.[4] Thus workers are protected from retaliation when they help enforce federal laws relating to clear air, safe drinking water and proper disposal of solid hazardous waste. Yet workers have no statutory protection from retaliation if they help enforce federal laws relating to noise pollution,[5] marine pollution,[6] flood control,[7] protection from toxic and radioactive material,[8] and pesticide use.[9] As ACUS documented, there appears to be no rationale for protecting whistleblowers involved in furthering some federally-recognized environmental purposes, while denying protection for helping to enforce other equally important recognized federal environmental purposes.

In addition to the gaps in whistleblower coverage for environmental protection, there is a total lack of whistleblower protection for workers trying to safeguard the health and safety of consumers. Workers in the food processing industry have been summarily dismissed for cooperating with federal government inspectors who are trying to enforce federal food safety and sanitary requirements. In

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[4] *See* section 23 of the Toxic Substances Control Act, 15 U.S.C. 2622; section 507 of the Federal Water Pollution Control Act, 33 U.S.C. 1367; section 1450 of the Public Health Service Act (Safe Drinking Water Act), 42 U.S.C. 300-9; section 210 of the Energy Reorganization Act, 42 U.S.C. 5851; section 7001 of the Solid Waste Disposal Act, 42 U.S.C. 6971; section 322 of the Clean Air Act, 42 U.S.C. 7622; and section 110 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610.

[5] *See* Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.* and 49 App. U.S.C. 1431.

[6] *See* Marine Protection, Research and Sanctuaries Act of 1972 as amended by the Ocean Dumping Ban Act, 16 U.S.C. 1431-39 and 33 U.S.C. 1401 *et seq.*; Deepwater Port Act of 1974, 33 U.S.C. 1501 *et. seq.*; Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*; Organotin Antifouling Paint Control Act of 1988, 33 U.S.C. 2401 *et seq.*; United States Public Vessel Medical Waste Anti-Dumping Act; 33 U.S.C. 2501 *et seq.*; Shore Protection Act of 1988, 33 U.S.C. 2601 *et seq.*; Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101 *et seq.*

[7] *See* Federal Power Act, 16 U.S.C. 791 *et seq.*; Flood Control Acts, 33 U.S.C. 701 *et seq.*

[8] *See* Nuclear Waste Policy Act, 42 U.S.C. 10101 *et seq.*; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001 *et seq.*

[9] *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*

testimony before the Labor Subcommittee, Donald S. Henley, Jr., of Ashboro, North Carolina, discussed how he had been fired from his job as a quality control supervisor after he reported to the on-site federal inspector that some 3,000 pounds of inadequately cured processed hams were about to be shipped to consumers. Mr. Henley described the generally-accepted rules of behavior based on his experience in the industry:

> If you want to keep your job, you follow orders and do not talk back. It does not matter if the order is illegal; you do what you are told. Above all, you do not tell the Government when the company is violating the law, or you will be out the door. When I worked in the industry, I just did not have the freedom to do the right thing.

S. 436 Hearing at 77.

Mr. Henley was one of the few people willing to come forward to testify. That is the point of retaliation in the first place. It is designed not only to silence the particular whistleblower, but also to chill any future disclosures by other workers. Mr. Henley stated that, as a result of his firing, his fellow employees "all got the message, too. Many said they thought what happened was wrong, but they also said I should have known better. Since I left, to my knowledge, no one else has repeated my mistake of sticking his neck out." Id. at 78–79.

Another whistleblower, William Donald Wright, of Enterprise, Alabama, expressed similar sentiments. Mr. Wright was an emergency medical services helicopter pilot who was fired after complaining to the FAA about flight safety violations. He had no federal protection from retaliation. When asked if he would blow the whistle on federal aviation safety problems again, Mr. Wright responded: "if I knew the outcome would be as it is I would be reluctant to try and correct the safety problems. Instead, I would be inclined to turn my back and walk away." Id. at 76.

The chilling effect of retaliation is the reason why the need to fill gaps in whistleblower protection cannot be judged solely by the number of whistleblowers that come forward to testify. If there is no protection available under federal law, it takes a particularly courageous individual to step forward to help enforce the law. But the ability to intimidate workers into silence is a critical reason why there should be federal protection from retaliation in the first place.

Thus although food and aviation safety were highlighted in the hearings, the problems are not limited to those two areas. In addition to food and animal safety and sanitation requirements administered by the Department of Health and Human Services [10] and the Department of Agriculture,[11] there are no federal statutory whistleblower protections for:

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[10] *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301-393; Tea Importation Act, 21 U.S.C. 41-50; Import Milk Act, 21 U.S.C. 141-149.

[11] The food and animal safety and sanitation requirements administered by the Department of Agriculture are pursuant to such statutes as: The United States Grain Standards Act, 7 U.S.C. 71 *et seq.*; the Poultry Products Inspection Act, 21 U.S.C. 451-470; the Federal Meat Inspection Act and the Wholesome Meat Act, 21 U.S.C. 601-695; the Egg Products Inspection Act, 21 U.S.C. 1031-1056; the Animal Quarantine Acts, 21 U.S.C. 101-135; and the Virus, Serum & Toxin Act, 21 U.S.C. 151-158.

—pharmaceutical, cosmetic, and medical device safety requirements administered by the Department of Health and Human Services; [12]

—consumer product safety requirements administered by the Consumer Product Safety Commission; [13]

—transportation safety requirements administered by the Department of Transportation; [14] and

—housing safety requirements administered by the Department of Housing and Urban Development.[15]

Once again, this listing of gaps in coverage for whistleblower protection relating to public health and safety is illustrative, not exhaustive. If there is an established or authorized federal health or safety standard, there should be coordinate protection from employment discrimination for private sector workers who help further federal government efforts to enforce that standard. The Administration has recognized the need to close such gaps. The Secretary of Labor has acknowledged that gaps in occupational safety and health whistleblower protection and major gaps in public safety and health whistleblower coverage are appropriate areas for statutory protection.[16]

Finally, one particular gap in coverage deserves special mention because its existence is not apparent from a review of current statutes. Employees at government-owned, contractor-operated (GOCO) nuclear weapons facilities have no statutory protection from retaliation when they report health or safety violations. James Simpkin, formerly an employee at the Hanford, Washington GOCO facility,

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[12] Pursuant to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301-393.

[13] The Consumer Product Safety Commission acts pursuant to such statutes as: the Flammable Fabrics Act, 15 U.S.C. 1191-1204; the Refrigerator Safety Act, 15 U.S.C. 1211-1214; the Federal Hazardous Substances Act, as amended by the Child Protection and Toy Safety Act, 15 U.S.C. 1261 *et seq.*; the Poison Prevention Act of 1970; 15 U.S.C. 1471-1476; the Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.*; and the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4822 *et seq.*

[14] For example, the Department of Transportation (DOT) administers the Federal-Aid Highway Program, 23 U.S.C. 101 *et seq.*, which among other things sets standards for bridge inspections and construction of interstate highways. DOT also administers the National Traffic and Motor Vehicle Safety Act as amended by the Motor Vehicle and School Bus Safety Amendments, 15 U.S.C. 1381 *et seq.*; the Federal Aviation Act of 1958 as amended by Airline Deregulation Act of 1978, 49 App. U.S.C. 1301 *et seq.* (discussed above in the context of occupational safety and health); and the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1901 *et seq.*

[15] For example, the Department of Housing and Urban Development administers inspection and test standard procedures for locating lead-based paint in federally constructed and rehabilitated residential structures pursuant to the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4822 *et seq.*

[16] The current Administration has accepted the need for whistleblower protection to close the gaps in coverage to protect certain areas of public health and safety. Secretary of Labor Dole, on behalf of the Administration, has stated:

> [W]e believe that the addition of such whistleblower protection could be appropriate in several statutory areas, including:
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> (1) aviation safety requirements regulations administered by the Federal Aviation Administration, in order to reassure the public that air travel is safe;
>
> (2) food safety and sanitation requirements administered by the Food and Drug Administration and the Department of Agriculture, in order to reassure the public that the quality of the nation's food supply is being maintained;
>
> (3) drug safety requirements administered by the Food and Drug Administration, in order to reassure the public that our pharmaceuticals are safe; and
>
> (4) the Consumer Product Safety Act and related requirements administered by the Consumer Product Safety Commission, in order to reassure the public that consumer products are safe.

Letter, from the Honorable Elizabeth Dole, Secretary of Labor, to the Honorable Howard M. Metzenbaum, Chairman, Subcommittee on Labor, of the Senate Committee on Labor and Human Resources at 2 (August 14, 1989) [hereinafter cited as "Dole Letter"].

provided compelling evidence of this problem. During the 100th Congress, at the request of the House Energy and Commerce Committee, Mr. Simpkin testified about safety problems at the Hanford facility. Upon his return to work after his congressional testimony, the private contractor operating the Hanford facility began a campaign of intimidation and harassment that ultimately forced Mr. Simpkin to leave his job. At a subsequent congressional hearing convened specifically to review the retaliation against Mr. Simpkin, the Department of Energy, the owner of the facility, publicly admitted that (1) Mr. Simpkin was an excellent employee; (2) his belief that he had been harassed out of his job by the contractor because of his earlier testimony was reasonable; and (3) the Department of Energy failed to protect him. *See* Safety at DOE Nuclear Weapons Facilities: Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong. 2nd Sess. 542-45 (1988).

Mr. Simpkin, and other GOCO facility workers, are caught in linbo. They are not considered federal employees, so they may not take advantage of the whistleblower protections under the Civil Service Reform Act. But under current interpretations of section 210 of the Energy Reorganization Act, which protects private sector workers at facilities licensed by the Nuclear Regulatory Commission, GOCO facilty workers are outside the scope of coverage. *See, e.g., Wensil* v. *B.F. Shaw Co.*, 86-ERA-15 (Secretary of Labor, March 29, 1990); 4(b)(1) Report at 12. Therefore, Mr. Simpkin had no federal statutory remedy. His only option was to rely on the very weak administrative system established within the Department of Energy—a system that failed him miserably.[17]

In sum, as recognized by ACUS, the current federal whistleblower protection statutes have glaring omissions of "major sectors of the economy where health and safety are unquestionably at stake." ACUS Report, reprinted in S. 436 Hearing at 131. These omissions, which relate to basic areas of occupational and public health and safety, cannot withstand scrutiny.

D. Protected activity

The report accompanying the ACUS recommendation indicates that current federal health and safety whistleblower protection laws protect two basic types of conduct: disclosures of information and refusals to work. ACUS Report, reprinted in S. 436 Hearing at 134.

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[17] As of the writing of this report, the Department of Energy has proposed regulations to revise the administrative system that protects whistleblowers at GOCO facilities. Even if the regulations are adopted, they are not a substitute for federal statutory protection. In addition to such substantive deficiencies as an overly restrictive scope of protected conduct and an inadequate 30-day statute of limitations, the regulations have a critical structural flaw in that they place administration and enforcement authority for whistleblower protection within the Department of Energy, instead of with the employment experts at the Department of Labor. The Department of Energy owns the GOCO facilities. Thus there is an inherent conflict of interest where the owner of the facility is responsible for policing itself. Under curent federal whistleblower statutes, private sector whistleblowers have access to remedies that are independent of their employer or the ultimate owner of the project. Employees at GOCO facilities should have the same access to independent remedies.

(1) Protected disclosures

Disclosing information about violations or potential violations of law is the core function of a whistleblower and must be considered protected activity. as documented in the ACUS Report, twenty existing federal statutory provisions include some form of disclosure of information as an employee activity that should be protected from retaliation. ACUS Report, Table 3, reprinted in S. 436 Hearing at 178–79. For example, the Whistleblower Protection Act of 1989, P.L. 101–12, expressly protects "any disclosure of information" that evidences violation of law. 5 U.S.C. 1213(a)(1); 103 Stat. 21.

But simple disclosure of information is not the only accepted form of "blowing the whistle." Initiation of, or participation or assistance in a federal government proceeding is a standard protected activity found in existing federal whistleblower protection laws. See e.g. Energy Reorganization Act, 42 U.S.C. 5851; Clean Air Act, 42 U.S.C. 7622. For example, James Simpkin, the nuclear weapons worker who was retaliated against after testifying at a congressional hearing, should have protection. Likewise, a witness in a federal court or administrative agency proceeding who provides information that relates to enforcement or administration of a federal health or safety requirement should not be powerless to fight reprisals. Moreover, if a federal inspector seeks the cooperation of a worker in an investigation, that worker should not be punished for cooperating with the inspector. Donald Henley, the former meatpacker, and others like him, should not have to sacrifice a job as the price for cooperating with federal inspectors.

A worker who has made known an intent to disclose information or participate in a proceeding should be protected from retaliation or threats of retaliation. Advance retaliation designed to prevent the planned disclosure should not be tolerated. For example, in one situation, an employee, in his role as director of regulatory affairs, informed his employer that he would feel bound to inform the Food and Drug Administration if the employer insisted on violating federal law by selling a batch of defective artificial kidneys. The employer discharged the employee first, then sold the defective medical devices. The fired employee immediately informed the Food and Drug Administration, which thereupon confiscated the defective products. Technically, the employee was fired before a disclosure was made to the federal agency, but he was discharged because he made clear his intent to "blow the whistle." [18] Such advance retaliation is no different than retaliation after the disclosure has occurred. There is a need to protect whistleblowers in those circumstances.

Under existing federal whistleblower protection laws, there is no requirement that an employee ascertain the objective accuracy of a particular disclosure before making it. The Department of Labor's position on this aspect of protected conduct is clear: "we do not believe an employee should, prior to disclosing an apparent hazard,

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[18] This example is a summary of the facts from *Balla* v. *Gambro, Inc.*, No. 88–2955 (Ill. App. 1989). Ironically, because medical device safety requirements are governed by the Federal Food, Drug and Cosmetic Act, the whistleblower had no federal statutory protection. Thus, it is another example of a gap in coverage that would be closed by the provisions of this Act.

have to take affirmative steps to confirm the existence or seriousness of a hazard." Letter from Robert P. Davis, Solicitor of Labor, to the Honorable Marge Roukema, Ranking Member of the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor at 3 (April 9, 1990) [hereinafter cited as "Davis Letter"]. Of course, if the employee's belief is completely unreasonable or in bad faith, then there would be no protection. *See Landers* v. *Commonwealth-Lord Joint Venture*, 83-ERA-5 (Secretary of Labor, Sept. 9, 1983) (adopting ALJ decision that there is no protection for a belief that "may be totally false, misleading or malicious").[19] But such a determination can and should be made on a case-by-case approach as is the practice under current law. *See* Davis Letter at 3.

Current federal whistleblower statutes also do not require employees to give employers an opportunity to correct the alleged violation prior to engaging in protected disclosures. The ACUS Report documents that the overwhelming majority of existing laws do not require such advance notification. ACUS Report at Table 5 reprinted on S. 436 Hearing at 181-82. That requirement would limit the number of disclosures and undermine the underlying effort to uncover federal safety and health violations. The Department of Labor recently addressed this issue:

> While we certainly recognize that . . . an advance notification requirement might result in more prompt elimination of some hazards, we are concerned that such a requirement could chill the willingness of employees to bring to the attention of Government serious health or safety threats to the public. This is particularly important in the context of a broad Federal whistleblower protection bill, that will cover whistleblowing about threats to our food supply, aircraft, nuclear facilities, and the environment. . . . Accordingly, although we are sympathetic to the idea of advance notification prior to protected disclosure, we believe its merits are outweighed by the need to implement effectively the safety and health laws enacted by Congress.

Davis Letter at 2-3.

Moreover, requiring notification or permission before engaging in protected activity would eliminate the possibility of making a confidential disclosure to the government. Congress recognized the importance of protecting the identity of whistleblowers in the Whistlebower Protection Act of 1989, which applies to federal employees. As noted by the chief sponsors of that Act in the joint explanatory statement, Congress declared that "it is unrealistic to expect whistleblowers to help * * * if they risk the exposure of their names and possible retaliation." Joint Explanatory Statement on Senate Amendment—S. 20, reprinted in 135 Cong. Rec. at H747 (March 21, 1989). Such a requirement would chill disclosures and could undermine the goal of improved enforcement of federal health and safety laws.

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[19] Under the federal criminal code, a person who knowingly and willfully provides false statements to a government agency may be subject to a fine or imprisonment, or both. *See* 18 U.S.C. 1001.

(2) Refusal to work

A number of existing federal whistleblower laws also include protection for employee refusals to participate in illegal or extremely hazardous work. Those laws recognize that protections for such refusals—which in other circumstances could be considered insubordination—must be delineated precisely. The protection must be sufficient to ensure that legitimate whistleblowing is not chilled, but limited so as not to impinge on an employer's ability to control the workplace.

Existing federal whistleblower laws achieve this delicate balance. Three separate statutory provisions to protect whistleblowers in interstate truck and bus operations, 49 App. U.S.C. 2305, railroad operations, 45 U.S.C. 441, and mining, 30 U.S.C. 815, expressly provide for protection from retaliation for refusal to work. The Department of Labor, either by interpretation in the case of the Energy Reorganization Act,[20] or by regulation in the case of the Occupational Safety and Health Act, 29 CFR 1977.12(b)(2), has accepted the need to protect workers from retaliation for refusals to work. Moreover, the Whistleblower Protection Act, signed into law by President Bush in 1989, added protection for federal civil servants who have been retaliated against "for refusing to obey an order that would require the individual to violate the law." 5 U.S.C. 2302(b)(9)(D); 103 Stat. 32.

Two examples will demonstrate the good reasons for such protection. In *Whirlpool Corporation* v. *Marshall*, 445 U.S. 1 (1980) the Supreme court unanimously upheld the Secretary of Labor's regulations to protect refusals to work under the Occupational Safety and Health Act. In that case, the hazardous activity involved performance of maintenance work on a wire-mesh guard screen hanging some twenty feet above the floor of a manufacturing plant. A number of workers previously had been injured while performing such work when they fell through the screen. A worker had fallen to his death through the screen some 10 days prior to the employees' decision to refuse to perform the hazardous work. In the intervening days, the maintenance workers expressed concerns to the employer and to OSHA about the hazardous nature of the guard screen. Despite these complaints, no immediate repairs were made. Thereupon, two workers refused to perform maintenance tasks on the guard screen and they were disciplined for this decision.

No worker should be punished for refusing to participate in an activity where that worker has a reasonable apprehension of a bona fide danger of serious injury or death, particularly where that worker has a reasonable belief that there is no less drastic alternative available. An employee confronting the difficult choice between not performing assigned tasks or subjecting himself or others to the genuine threat of serious injury or death should be able to make the good faith decision to refuse to perform the assigned task without fear of subsequent discrimination.

The same policy should apply where the genuine threat relates to the health or safety of the public. In the 100th Congress, the Labor Subcommittee received testimony from Scott Buethe, who

[20] *See Pennsyl* v. *Catalytic, Inc.*, 83-ERA-2 (Secretary of Labor, January 13, 1984).

was discharged from his job as a co-pilot with a commuter airline after he refused to fly two scheduled flights that did not meet minimum, mandatory federal aviation safety standards. Significantly, Mr. Buethe was concerned solely with the safety of his passengers; he did ferry the defective aircraft to the nearest maintenance base with no passengers on board, as allowed by the Federal Aviation Administration. Uniform Health and Safety Whistleblowers Protection Act: Hearing on S. 2095 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 100th Cong., 2nd Sess. 14 (1988) [hereinafter cited as "S. 2095 Hearing"]. Likewise, Mr. Buethe did not walk off the job and refuse all forms of work. He simply refused to perform the task that threatened public safety and violated federal law. In fact, after the defective equipment on one of the aircrafts was repaired, Mr. Buethe flew the remaining scheduled flights on his shift, without incident. *id.* at 15.

Mr. Buethe's case also illustrates the need to protect workers who refuse to participate in an illegal action from subsequent retaliation. The principle that workers should not be punished for refusing to be a party to a violation of the law is not a novel one. Indeed, the first significant articulation of the public policy exception to the at-will employment doctrines was in a case that involved a worker who refused to violate the law at the behest of his employer. *See Petermann* v. *International Brotherhood of Teamsters, Local 396,* 344 P.2d 25 (Cal. App. 1959) (employee fired one day after he testified truthfully at legislative hearing after refusing employer's orders to commit perjury). The court, in *Petermann,* stated the prinicple forcefully:

> It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit . . . an act specifically enjoined by statute . . . [I]n order to more fully effectuate the state's declared policy . . . the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration. . . . To hold otherwise would be without reason and contrary to the spirit of the law.

344 P.2d at 27.

Congress also recognized the importance of that principle. For example, the Surface Transportation Assistance Act, 49 App. U.S.C. 2305, protects employees from discrimination for refusal to participate in violations of federal law relating to trucking. There is a difference, however, between the purposes served by protecting disclosures of information regarding health and safety violations and the purposes served by protecting refusals to work. As discussed above, the disclosure of information relating to health or safety violations aids federal enforcement efforts and should be encouraged. We should therefore be wary of placing prior restraints on workers that would chill legitimate whistleblowing. On the other hand, an employee's refusal to work does not necessarily impart new information to the public in furtherance of the enforcement of federal law. More often it is the private act of an individ-

ual worker who, with no reasonable alternative, is forced to protect himself (or the public) by refusing in good faith to perform an illegal or extremely dangerous task.

The Surface Transportation Assistance Act refelcts this distinction in that protection for refusal to work is more circumscribed that protection for disclosures of information. Under the Surface Transportation Assistance Act, an employee must take affirmative steps to ascertain that there is an actual violation of law before refusing to perform an allegedly illegal task. If there is no violation in fact and the employee nonetheless refuses the order, the employee will not be protected. In contrast, an employee who discloses information that he or she believes evidences a violation of law is protected regardless of whether or not there is in fact a violation.

The requirement of actual violation, however, does not apply to refusals to perform extremely hazardous tasks. In that circumstance, the reasonable apprehension of a reasonable person that a bona fide danger exists is sufficient to warrant protection. There should be less stringent standards for refusal to participate in extremely hazardous work because in such urgent situations, workers should be allowed to err on the side of avoiding serious, imminent danger without fear of subsequent discrimination.

The other significant difference between protected disclosures and protected refusals to work is that workers must give employers an opportunity to correct the alleged illegal or hazardous condition before refusing to work. Current law limits protection for refusal to work to those situations where there is no reasonable alternative, as evidenced by the requirement that the employee, where possible, must have sought and been unable to obtain a correction of the dangerous or illegal activity before refusing to work.[21]

E. Procedures/Remedies

(1) Centralized enforcement

The Department of Labor now investigates and adjudicates complaints under a majority of existing federal health and safety whistleblowing statutes. As documented in the ACUS Report, the Secretary of Labor has investigative responsibility under 13 existing statutes, with that responsibility assigned to the Wage and Hour Division for the majority of those statutes, and to the Occupational Health and Safety Administration or the Mine Safety and Health Administration under several of the existing provisions. ACUS Report, Table 1, reprinted in S. 436 Hearing at 177. Not all existing federal whistleblower laws are administered by the Department of Labor—a number are administered by the substantive program agency. For example, whistleblower protection in railroad operations under the Federal Railroad Safety Authorization Act is administered by the Federal Railroad Administration. Id.

The ACUS official recommendation recognized that the lack of centralized enforcement and administration is one component of current law that "does not appear to be reasoned." ACUS Recom-

[21] *See e.g. Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980) (OSHA); *Secretary ex rel. Robinette* v. *United Castle Coal Co.*, 2 MSHC 1213 (R.C. 1981) (MSHA); *Pennsyl* v. *Catalytic, Inc.* 83-ERA-2 (Secretary of Labor, January 13, 1984) (ERA); Federal Railroad Safety Authorization Act, 45 U.S.C. 441; Surface Transportation Assistance Act, 49 App. U.S.C. 2305(b).

mendation, reprinted in S. 436 Hearing at 197. Accordingly, ACUS concluded that "centralization of the investigative and adjudicative function is needed." Id. Because of the existing experience and expertise of the Department of Labor in this area, ACUS concluded that "centralization in that Department is the logical choice." Id.

(2) Administrative procedure

The ACUS recommendation calls for the adoption of a traditional administrative adjudication procedure, as outlined in the Administrative Procedure Act (APA). The official recomemndation indicates that whistleblower legislation should include:

> provision for an opportunity by any affected person to request an one-the-record APA hearing before a Department of Labor administrative law judge and for discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts.

ACUS Recommendation, reprinted in S. 436 Hearing at 200.

(3) Remedies

There are a variety of remedies available under the existing federal whistleblower laws. Traditioanl make-whole remedies and equitable relief, including provisions to order affirmative action to abate the discriminatory conduct, are typical under current law. Thus, virtually all of the existing federal whistleblower statutes provide for the possibility of abatement, reinstatement together with back pay and back benefits, and an award of attorney's fees and costs to the successful whistleblower complainant. See ACUS Report, reprinted in S. 436 Hearing at 149.

But more recently, Congress has recognized that limited remedies may not be adequate to make a whistleblower whole. Whistleblowers may lose more than just a particular job. An effective retaliatory campaign can cost a worker a career as well as great personal hardship. William Donald Wright, the fired hospital helicopter pilot testified about the impact of the retaliation:

> I lost my job, my reputation, my ability to obtain comparable employment due to being blackballed, my savings and my home . . . [W]e blew the whistle in order to protect ourselves, our medical crew members, our patients, and the public. That action has cost us much more than financial loss. The personal degradation for some of us has rocked the very core of our lives.

S. 436 Hearing at 74.

In fact, that is part of the chilling message of retaliation: "we can destroy the messenger of bad news, so the next worker should think twice before disclosing such information."

That chilling message will be less effective if whistleblowers receive full make-whole remedies. If legitimate whistlebowers can be vindicated and not suffer financially because of retaliation, the power of a retaliatory threat will be lessened significantly. A number of the more recently-enacted federal whistleblower laws allow for compensatory damages, in addition to reinstatement and

back pay.[22] For example, the Surface Transportation Assistance Act, the statute which incorporates a number of developments in whistleblower law, includes authority for the Department of Labor to award compensatory damages. President Bush also has acknowledged the need to ensure that legitimate whistleblowers receive adequate compensation. Upon sigining the Whistleblower Protection Act of 1989 into law to enhance protections for federal employee whistleblowers, the President stated:

> I share the determination of the Congress that we do everything possible to ensure that these dedicated men and women should not be fired or rebuked or suffer financially for their honesty and good judgment.

25 Weekly Compilation of Presidential Documents at 515 (April 17, 1989) (Remarks of President Bush at April 10, 1989, Signing Ceremony).

Standard make-whole remedies, however, will be meaningless, in practice, if whistleblowers are crushed personally and financially while legitimate complaints are caught in procedural limbo. There is a need for interim relief in the form of temporary reinstatement once the Department of Labor has made an initial finding that there is reasonable cause to believe an alleged discriminatory act has occurred. The opportunity for temporary reinstatement of legitimate whistleblowers already exists for whistleblowers in the mining and trucking industries. See Federal Mine Safety and Health Act, 30 U.S.C. 815(c); Surface Transportation Assistance Act, 49 App. U.S.C. 2305(c). Moreover, the whistleblower reforms for federal employees signed into law by President Bush in April 1989 provide for similar interim relief. A federal employee whistleblower is allowed to seek a stay of an adverse employment action pending final disposition of the complaint. 5 U.S.C. 1221(c); 103 Stat. 30. If the Office of Special Counsel determines that there are "reasonable grounds" to believe that retaliation has occurred, there is a presumption that the requested stay should be granted. 5 U.S.C. 1214(b)(1); 103 Stat. 25.

The need for temporary reinstatement relates back to the need to avoid chilling legitimate whistleblowers. The Department of Labor, under President Reagan, expressly endorsed the need for temporary reinstatement in commenting on a bill to protect aviation whistleblowers. The endorsement succinctly sets out the case for this remedy:

> Even if the Department of Labor acts in a timely fashion, however, whistleblowers may face severe financial problems as a result of their action. Some cases can be on appeal for several years, imposing great hardship if the employee has been discriminated against in employment or employment opportunities. Accordingly, the Department recommends that the legislation include authority

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[22] *See* Toxic Substances Control Act, 15 U.S.C. 2622; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Energy Reorganization Act, 42 U.S.C. 5851; Clean Air Act, 42 U.S.C. 7622; Surface Transportation Assistance Act, 49 App. U.S.C. 2305 (c)(2)(B). *See also DeFord* v. *Secretary of Labor*, 700 F. 2d 281 (6th Cir. 1983) (discussing the types of damages available to whistleblowers under the Energy Reorganization Act).

> for the Department to order temporary reinstatement of an employee, consistent with our authority under the Surface Transportation Assistance Act . . . [F]ailure to include such protection is likely to have a chilling effect on whistleblower activity, since the financial and psychological risks faced by employees who have suffered illegal retaliation may make their fellow employees less likely to step forward in the future.

Letter from the Honorable Ann McLaughlin, Secretary of Labor to the Honorable Glenn Anderson, Chairman, House Committee on Public Works and Transportation, Attachment at 3 (July 27, 1988).

The Bush Administration has taken a more restrictive view of the need for temporary reinstatement. Secretary Dole, in her letter to the Labor Committee commenting on this Act, distinguished between general federal whistleblower statutes and federal whistleblower statutes that "address industries which are regulated heavily," where temporary reinsatement may be available under current law. Dole Letter at 6.

Secretary Dole's distinction between whistleblowers in general industries and whistleblowers in "heavily regulated" industries is not well-founded. The availability of temporary reinstatement revolves around the need to reduce the chilling effect on legitimate whistleblowing, which has noting to do with the degree to which a particular industry is "regulated." If temporary reinstatement will reduce the chilling effect for whistleblowers in mining, trucking, and the federal service, it should have the same positive impact on legitimate whistleblowers who currently have no protection under federal statute and who would fall within the scope of coverage of this bill.

(4) Action-forcing mechanisms

Delay in resolving a whistleblower's complaint serves no one's interests. The employee, the person alleged to have retaliated against the employee, the administrative agency and the public all will benefit from prompt resolution of a complaint. The problem of delay has two dimensions: policy and legal. As a matter of policy, failure to resolve a dispute in a timely fashion creates severe financial and psychological problems for the individual whistleblower and deters future whistleblowers. Even the availability of temporary reinstatement cannot eliminate all these problems. Likewise, failure to resolve the complaint quickly leaves a cloud of suspicion hanging over the employer.

As a matter of law, where temporary reinstatement has been ordered pending a final outcome of a complaint, failure to resolve the complaint expeditiously may create constitutional due process problems. An employer generally has the right to discharge an employee at will, if there is no contract, or subject to the terms of the existing employment contract. That right of the employer may be taken away in a particular case if after opportunity for a due process proceeding, it is determined that the employer has violated the law by retaliating against a whistleblower.

Temporary reinstatement ordered after an investigatory finding suspends the employer's right to act against an employee without

the benefit of a full hearing. Nonetheless, the Supreme Court, in *Brock* v. *Roadway Express., Inc.,* 481 U.S. 252 (1987), upheld the constitutionality of the temporary reinstatement provision of the Surface Transportation Assistance Act from the employer's due process challenge. The Court stated that the provisions was constitutional so long as the employer receives "notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses." 481 U.S. at 264. The Court found there was no need for the employer to confront or cross-examine the whistleblower's supporting witnesses at the preliminary stage, "again so long as the employer is otherwise provided an opportunity to respond 'at a meaningful time and in a meaningful manner.'" Id. at 266, quoting *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). But the Court warned that "[a]t some point, delay in holding postreinstatement evidentiary hearings may become a constitutional violation." Id. at 267.

Thus an overly long delay between an order for temporary reinstatement and a final resolution of the complaint could constitute a constitutional deprivation of due process rights. The Surface Transportation Assistance Act whistleblower provision challenged the *Roadway Express* case provides for a maximum 180-day period between the initial order of temporary reinstatement and the final decision of the Secretary after an administrative hearing. However, because the Secretary of Labor does not treat these time requirements as mandatory, but merely "directory in nature," it took the Secretary some 19 months to issue a final order in the *Roadway Express* case. Id. at 268. Despite this extended delay, the Supreme Court did not strike down the provision as a violation of due process. *Roadway Express* highlights both the need for and the limits on action-forcing mechanisms.

(5) Burdens of proof

Whistleblower complaints typically involve so-called "mixed motive" decisions. The whistleblower alleges that there is a causal relationship between the protected conduct and the resulting adverse employment action. The employer, on the other hand, argues that there was an independent, lawful reason for the employment decision. The adjudicator must ascertain the true motive based on the presentations of the parties. The approach relied upon by most existing federal whistleblower statutes comes from the Supreme Court's analysis of mixed-motive cases in *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977). The *Mt. Healthy* analysis provides that the plaintiff has the initial burden to prove, by a preponderance of the evidence, that the protected conduct was a "substantial" or "motivating" factor in the employer's adverse employment decision. 429 U.S. at 287. If the plaintiff meets that initial burden, then the burden of proof shifts to the employer to prove "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.*

But after a very careful review by Congress and extensive discussion between the Congress and the Administration on this subject,

Congress and the Bush Administration agreed to reject the *Mt. Healthy* approach in the most recently-enacted whistleblower statute, the Whistleblower Protection Act of 1989. Congress instead adopted a standard for federal employee whistleblowers where the employee must establish a *prima facie* case by a preponderance of the evidence that the protected whistleblowing activity was a "contributing factor" in the adverse personnel action. That standard is less demanding than the "substantial" or "motivating" factor requirement for *Mt. Healthy*. As indicated by the Attorney General in support of the provision, "[a] 'contributing factor' need not be 'substantial.' The individual's burden is to prove that the whistleblowing contributed in some way to the agency's decision to take the personnel action." Letter from the Honorable Dick Thornburgh, Attorney General to the Honorable Carl Levin (March 3, 1989), reprinted in 135 Cong. Rec. at H748 (March 21, 1989).

If the federal whistleblower sustains the initial burden of proof, then the burden shifts to the employer to prove by "clear and convincing evidence that it would have taken the same personnel action in the absence of such [protected] disclosure." 5 U.S.C. 1221 (e)(2); 103 Stat. 30. The "clear and convincing" standard for the affirmative defense is tougher than the "preponderance of the evidence" standard under *Mt. Healthy*.

In a joint explanatory statement, the chief sponsors of the bill explained why they rejected the *Mt. Healthy* test for federal employee whistleblowers:

> By reducing the excessively heavy burden imposed on the employee under current case law, the legislation will send a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated. Whistleblowing should never be a factor that contributes in any way to an adverse personnel action.
>
> At the same time, however, this new test will not shield employees who engage in wrongful conduct merely because they have at some point "blown the whistle" on some kind of purported misconduct. In such cases the agency will, of course, be provided with an opportunity to demonstrate that the employee's whistleblowing was not a contributing factor in the personnel action.
>
> "Clear and convincing evidence" is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action—in other words, that the agency action was "tainted." Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards—the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that

> could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.

Joint Explanatory Statement on Senate Amendment—S. 20, reprinted in 135 Cong. Rec. at H747-48 (March 21, 1989).

That explanation applies equally to private sector health and safety whistleblowers. The same clear message that Congress intended to send to federal agencies about not tolerating retaliation against whistleblowers should also be sent to the private sector. Just as the *Mt. Healthy* test creates an excessively heavy burden on federal whistleblowers, it creates the same excessive burden on private sector whistleblowers.

Statistics support this comparison. Prior to the enactment of the Whistleblower Protection Act of 1989, federal employee whistleblowers hardly ever prevailed. For example, in the first five years under the old employee protection provisions of the Civil Service Reform Act, federal whistleblowers who filed complaints prevailed only three times. By comparison, of the 38 reported decisions issued by the Secretary of Labor since 1985 under the private sector environmental whistleblower statutes, the whistleblower prevailed in only five decisions. That is less than a fifteen percent succes rate. In the last three years, the Secretary has issued only one decision in favor of a whistleblower under those statutes. Moreover, in roughly one-third of the 33 cases where the whistleblower did not prevail, the *Mt. Healthy* standard for the prima facie case of the affirmative defense played a role in the decision. *See, e.g. Lockert* v. *Pullman Power Products Corp.*, 85-ERA-15 (Secretary of Labor, October 22, 1987), affirmed *sub nom. Lockert* v. *Department of Labor*, 867 F.2d 513 (9th Cir. 1989); *Uddin* v. *Baldwin Associates*, 85-ERA-25 (Secretary of Labor, March 18, 1986); *Royce* v. *Bechtel Power Corp.* (Secretary of Labor, July 11, 1985).

Thus, the *Mt. Healthy* standard has had a significant impact on private sector whistleblowers as it did on federal employee whistleblowers. The need to remove this excessive burden is just as great. Further, the circumstances that warrant an agency bearing a heavier burden of justification apply equally to private sector employers who retaliate against whistleblowers.

F. Enforcement referrals

Although the focus of any whistleblower protection provision is to protect against retaliation, one must not lose sight of the fact that the reason why whistleblowers are protected is to encourage the exposure of violations or potential violations. In the public hearing conducted by ACUS as part of its extensive review of existing federal health and safety whistleblower laws, Senator Charles Grassley testified about the need to keep the underlying problems in mind. Senator Grassley related that a survey of 5,000 federal employees showed that 70-percent would not report observed fraud. He indicated that the number one reason cited for non-reporting was "the belief that the problem they exposed would not be corrected." Private Sector Whistleblower Protection Statues: Public Hearing Before the Administrative Conference of the United States

12 (October 1, 1986) (testimony of the Honorable Charles Grassley, United States Senator).

Senator Grassley concluded that "the question is not only whether the system adequately protects against retaliation, but also, whether it effectively investigates that leads to the correction of the matter exposed." Id. at 13. The Commitee agrees that there is a need to ensure that the program agency responsible for the underlying substantive health or safety problem exposed by the whistleblower is apprised of the problem as soon as possible.

G. Effect on State laws

As noted above, the overwhelming majority of states, whether by statute or through court interpretation, have recognized the public policy exception to the at-will employment doctrine. Some 35 states have adopted either general whistleblower protection statutes or more narrowly focused laws that protect only public employee whistleblowers.[23] Existing federal whistleblower protection statutes do not supersede the rights and remedies available under state statutes and common law. In enacting over a dozen separate private sector health and safety whistleblowers provisions, Congress has chosen not to preempt state laws. That is the case even where Congress has declared that the underlying substantive safety program is within the exclusive control of the federal government.

Thus, for example, the Occupational Safety and Health (OSH) Act does preempt state regulation of workplace safety and health conditions to the extent that there is a specific federal standard regulating a particular condition. But courts have held that the whistleblower provisions of the OSH Act, 29 U.S.C. 660(c), do not preempt state law remedies for employees who are discriminated against for exercising their rights under the Act, even though there is a specific federal remedy for such a violation. *See Le Pore* v. *National Tool & Manufacturing Co.*, 540 A.2d 1296 (N.J. Super. 1988), affirmed, 557 A.2d 1371 (N.J.), *cert. denied*, 110 S. Ct. 366 (1989); *Kilpatrick* v. *Delaware County Society for Prevention of Cruelty to Animals*, 632 F. Supp. 542 (E.D.Pa. 1986).

A similar situation exists under the Energy Reorganization Act. It is settled law that the federal government has the exclusive right to regulate all aspects of nuclear safety. But the federal government takes the position that the whistleblower provisions of the Energy Reorganization Act do not exclude the availability of state rights or remedies for employees who are discrimnated against for "blowing the whistle" on nuclear safety violations. On April 25, 1990, the Supreme Court heard arguments in *English* v. *General Electric Co.* (No. 89-152) to resolve the whistleblower preemption issue under the Energy Reorganization Act.

In its brief to the Supreme Court, the Justice Department, joined by the Department of Labor, set out a strong policy rationale as to why preemption of state law is inappropriate in this area:

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[23] The states are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia and Wisconsin.

> Preemption is not required in order to implement any federal policy. There is no reason to believe that permitting state causes of action would either interfere with . . . [the federal] authority to adjudicate . . . [whistleblower] complaints or would otherwise frustrate the remedial goals of [the Energy Reorganization Act]. . . . And continued access to state remedies helps achieve Congress's primary goal by providing an additional, and possibly at times more effective, means of deterring employer misconduct that might otherwise impede the . . . [federal] ability to resolve nuclear safety problems.

Brief for the United States as Amicus Curiae in *English* v. *General Electric Co.* (No. 89-152) at 14 (Filed January 2, 1990).

The Supreme Court agreed with the Department of Justice. In a unanimous decision, announced on June 4, 1990, the Court decided that the whistleblower provision of the Energy Reorganization Act did not preempt a state remedy for the whistleblower. In reaching that conclusion, the opinoin noted that there was no "actual conflict" between state and federal remedies, and the Court would not seek "out conflicts between state and federal regulation where none clearly exists." *English* v. *General Electric Co.* (No. 89-152) slip opinion at 17 (June 4, 1990) (citation omitted).

State causes of action to protect private sector whistleblowers will neither "interfere with" nor "otherwise frustrate" federal health and safety regulation. Likewise, there is no "actual conflict" between the state and federal remedies for private sector whistleblowers. On the contrary, state remedies will help federal enforcement of health and safety law by "providing an additional, and possibly at times more effective means of deterring employer misconduct." Thus state remedies for private sector whistleblowers should not be preempted.

H. Uniform provisions

The ACUS recommendation called upon Congress to enact comprehensive legislation in "the interest of uniform treatment of private sector health and safety whistleblowers." ACUS Recommendation, reprinted in S. 436 Hearing at 199. Short of enacting such omnibus legislation, ACUS recommended that "Congress should strive for uniformity in the substantive protections and procedures applicable" to separate whistleblower protection programs. Id.

As discussed in detail below, this Act focuses on closing the existing gaps in whistleblower protection, rather than proposing a uniform federal whistleblower protection system. However, this Act does strive for uniformity within the protective system established for whistleblowers who currently lack protection and, in two specific areas, across program lines. Those two areas are statutes of limitations and subpoena power.

(1) Statutes of limitation

ACUS reported that "the range of statutes of limitation applicable to health and safety whistleblowing complaints is considerable and, given the plain kinship among these statutes, intellectually indefensible." ACUS Report, reprinted in S. 436 Hearing at 137. The

limitation periods for an initial filing of a complaint range from 30 days to 180 days. A 30-day filing period is simply too short to allow for meaningful whistleblower protection. ACUS recommended that there be a "uniform statute of limitations of not less than 180 days governing the filing of complaints". ACUS Recommendation, reprinted in S. 436 Hearing at 199.

In the 100th Congress, the Labor Subcommittee learned firsthand about problems caused by current, inadequate statutes of limitation. Ronald Masters, a Pennsylvania construction worker, was laid-off from his job building a nuclear power plant after he reported potential safety violations to the Nuclear Regulatory Commission's on-site representative. His safety concerns were valid. As a result of his disclosures, federal safety inspectors fined the nuclear power plant owner $75,000 and required a complete reinspection of all the structural steel on the site. S. 2095 Hearing at 17. But Mr. Masters lost his chance for whistleblower protection because he did not file a complaint under the Energy Reorganization Act within the 30-day statute of limitations period. He filed his complaint some three months after he was laid-off, but the complaint was dismissed as untimely. Mr. Masters addressed the problem directly in his testimony:

> For whatever reasons—whether, like me, the employee is initially uncertain of his ability to prove that the employer's motive was indeed retaliatory or he is unaware of the procedural limitations or he is more concerned with relocating and providing for his family—30 days can quickly pass and the employee can be left without any remedy. Failure to change the 30-day provision will result in twisting the *employee* protection provision envisioned by Congress into *employer* protection.

S. 2095 Hearing at 22 (emphasis in original).

The Department of Labor agrees with the need for a change in this area across-the-board. In commenting on this Act, Secretary of Labor Dole, on behalf of the Administration, stated:

> We agree with the Administrative Conference of the United States (ACUS) that legislation is appropriate to ensure that all such programs should have a uniform, 180-day statute of limitations. Some laws cut off the right to file a complaint after only 30 days. We believe that limitation periods shorter than 180 days have proved too short for effective protection of whistleblower rights.

Dole Letter at 3.

(2) Subpoena power

The other area where uniform procedural reform is appropriate involves the grant of subpoena power to the Secretary of Labor. The authority to issue enforceable subpoenas is essential if whistleblowers are to have meaningful hearings before the Department of Labor. For example, in one case presented to the Labor Subcommittee, the whistleblower subpoenaed four company executives to testify at a hearing before the administrative law judge. But the executives refused to appear and because there was no enforceable sub-

poena authority in the whistleblower statutes at issue, the administrative law judge concluded that he was powerless to take action. *See Crosby* v. *Hughes Aircraft Co.*, 85–TSC–2 as discussed in S. 2095 Hearing at 39. The whistleblower was deprived of the opportunity to produce valuable evidence and his legal effort was severely impaired.

ACUS and the Department of Labor both recognize the need to address this problem through express statutory language to eliminate any ambiguity about the existence of subpoena power for the Secretary of Labor. ACUS called for "a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement". ACUS Recommendation, reprinted in S. 436 Hearing at 200.

Secretary Dole, on behalf of the Administration, echoed this concern: "[W]e agree that the Department of Labor should be provided with explicit subpoena power, consistent with constitutional constraints, to support its investigative and adjudicative responsibilities under all such programs already administered by this Department." Dole Letter at 3.

III. HISTORY OF THE LEGISLATION

In the 100th Congress, S. 2095, a bill to strengthen the protections available to private employees against reprisal actions for disclosing information, to protect the public health and safety, and for other purposes, was introduced on February 23, 1988 by Senators Metzenbaum, Pell, Weicker and Harkin. The bill was referred to the Committee on Labor and Human Resources. A hearing on S. 2095 was held on July 26, 1988 before the Subcommittee on Labor. No further action was taken on the bill in the 100th Congress.

In the 101st Congress, S. 436, a bill to strengthen the protections available to employees against reprisals for disclosing information, to protect the public health and safety, and for other purposes, was introduced on February 23, 1989 by Senators Metzenbaum, Grassley, Simon, Pell, Dodd, Mikulski, Harkin, Levin and Kennedy. The bill was referred to the Committee on Labor and Human Resources. A hearing on S. 436 was held on March 7, 1989 before the Subcommittee on Labor. The legislation was considered at an executive session of the Committee on Labor and Human Resources on April 25, 1990. Senator Metzenbaum proposed an amendment in the nature of a substitute. The substitute amendment was accepted by the Committee on Labor and Human Resources on April 25, 1990.

IV. HEARINGS

Public hearings were conducted in the 100st Congress by the Subcommittee on Labor in Washington, D.C., on July 26, 1988, to review S. 2095, a bill to strengthen the protections available to private employees against reprisal actions for disclosing information, to protect the public health and safety, and for other purposes. The following individuals presented testimony:

Fred W. Alvarez, Assistant Secretary for Employment Standards Administration, United States Department of Labor, Washington, D.C.;

Marshall J. Breger, Chairman, Administrative Conference of the United States, Washington, D.C.;

Eugene R. Fidell, partner, Klores, Feldesman and Tucker; consultant to the Administrative Conference of the United States, Washington, D.C.;

Scott A. Buethe, Williamsville, New York;

Ronald M. Masters, Columbia, Pennsylvania;

Bette Simon, Dewey, Oklahoma; and

Richard E. Condit, staff attorney, Government Accountability Project, Washington, D.C.

Public hearings were conducted in the 101st Congress by the Subcommittee on Labor in Washington, D.C. on March 7, 1989, to review S. 436, a bill to strengthen the protections available to employees against reprisals for disclosing information, to protect the public health and safety, and for other purposes. The following individuals presented testimony:

Capt. Henry Duffy, president, Air Line Pilots Association, Washington, D.C.;

Carol Tucker Foreman, partner, Foreman & Heidepriem, and former Assistant Secretary of Agriculture, Washington, D.C.;

Thomas Devine, legal director, Government Accountability Project, Washington, D.C.;

The Honorable Charles E. Grassley, United States Senator from Iowa;

James W. Simpkin, Loveland, Colorado;

William Donald Wright, Enterprise, Alabama;

Donald S. Henley, Jr., Ashboro, North Carolina;

Jerry G. Thorn, Acting Solicitor of Labor, United States Department of Labor, Washington, D.C.

V. COMMITTEE VIEWS

A. General principles

S. 436, the Employee Health and Safety Whistleblower Protection Act, (the "Act") embodies the strong congressional policy that no person who takes an action to help enforce federal health and safety laws should suffer because of that action. That is a bedrock principle that complements the equally strong congressional interest in protecting the public health and safety. It is an empty gesture for the federal government to encourage voluntary compliance and citizen responsibility to help protect health and safety, unless there is an equivalent commitment to protect those people who come forward from retaliation. People who "blow the whistle" on federal health and safety violations deserve praise and gratitude, but what they need is protection from subsequent discrimination.

At the outset, therefore, it is important to emphasize that the Act is intended to be a remedial statute to provide necessary protection to workers who currently have no federal statutory remendy against retaliation when they help enforce federal health and safety laws. The Committee intends that this legislation be construed in order to effectuate fully the remedial purpose of providing essential protection against retaliation.

The Committee recognizes, however, that there is a body of law that has developed under the existing federal health and safety whistleblower protection statutes. The Committee understands that it does not write on a blank slate. This Act is not an attempt to "reinvent the wheel." Therefore, the Committee believes it is important to address the relationship between this Act and existing federal whistleblower statutes. Opponents of this legislation have argued that it is a "Cadillac" bill loaded with extra protections that go far beyond any existing law. That argument is specious.

The Act is not a carbon copy of each existing federal whistleblower statute. Nor is it a compendium of those components of existing statutes that appear with the most frequency in the United States Code. Rather, this Act reflects the fact that whistleblower protection has evolved over time. The Act is patterned after, and most closely resembles, the most recently-enacted statutory provisions. The Act borrows liberally from the Surface Transportation Assistance Act of 1982 and incorporates provisions of the Whistleblower Protection Act of 1989. Those statutes, in turn, reflect developments under earlier statutes, including the Federal Mine Safety and Health Act of 1977, the Energy Reorganization Act of 1974 and the Occupational Safety and Health Act of 1970. The Act also responds to issues raised by the Supreme Court's 1987 decision upholding the constitutionality of the Surface Transportation Assistance Act. *See Brock* v. *Roadway Express, Inc.*, 481 U.S. 252 (1987). The Act is consistent with these current developments in federal whistleblower protection law. It borrows from and reflects those laws that came before it.

But this Act is not intended to be the "last word" on whistleblower protection. It is not designed to resolve every specific issue that could arise in this area. Instead, where the law is settled, the Act adopts the settled interpretation. On the other hand, where current federal whistleblower statutes resolve particular issues on a case-by-case approach, this Act does not attempt to impose a generic solutions but defers to the need for case-by-case interpretation. Therefore, with the exception of the scope of coverage, which is a unique issue arising out of the gap-filling nature of the Act, the provisions of S. 436 relating to protected conduct, procedures and remedies should be interpreted in the same manner as the similar provisions of existing federal whistleblower protection law.

As discussed above in Section II.B. of this report, the Committee relied heavily on the ACUS recommendation and report in crafting the Act. The Committee has incorporated each specific legislative proposal recommended by ACUS, with one critical difference. ACUS called for the creation of a single, uniform process for private sector health and safety whistleblowers. An earlier version of the Act, introduced in the 100th Congress, S. 2095, the Uniform Health and Safety Whistleblower Protection Act, represented a single, uniform approach as called for by ACUS. Under S. 2095, existing whistleblower statutes were superseded by a new process, which also served the dual purpose of eliminating the glaring gaps in coverage.

While the goal of a single, uniform approach has considerable merit in terms of efficiency and consistency of results, it became clear during the 100th Congress that the most pressing issue was to

close the gaps in coverage. The debate in the 100th Congress did uncover some glaring procedural deficiencies in current law. The most notable ones were the inadequate statute of limitations in a number of statutes and the inability of the Secretary to compel production of documents or the appearance of witnesses in the course of conducting investigations into whistleblower complaints.

Therefore, the Act as re-introduced in the 101st Congress and as approved by the Committee differs from the ACUS recommendation in that it does not supersede existing laws with a single, uniform approach. Rather the Act focuses on three areas: closing gaps in coverage; establishing a uniform 180-day statute of limitations; and providing across-the-board enforceable subpoena authority for the Secretary of Labor. But the link to the ACUS recommendation remain unmistakable. The Act still follows the ACUS procedural model, but it applies that model only to those employees who will be covered by the gap-closing provisions of the Act.

B. Scope of coverage

Section 3(2) limits the coverage of the Act to those individuals who engage in protected activity, subsequently are discharged or discriminated against for that action and for whom "no remedy is available" under an existing federal whistleblower protection law. The existing federal laws referred to are listed in the bill at section 3(4). The list, which includes 16 separate statutory provisions, is intended to be a current, comprehensive compilation of those federal laws designed to protect whistleblowers from retaliation for engaging in acts to further the enforcement of substantive health or safety standards.

The Committee intends the term "no remedy is available" to be interpreted so as to avoid overlapping coverage between the Act and the 16 listed statutes. The term does not mean that no remedy, in fact, was awarded in a particular case. Thus, for example, if a worker who is covered by the provisions of the Occupational Safety and Health ("OSH") Act reports a violation of that Act to the Department of Labor and is subsequently retaliated against, that worker has a whistleblower remedy available under section 11(c) of the OSH Act. The fact that the worker may win or lose the particular case under section 11(c) is irrelevant. There is an existing federal statutory mechanism available for the worker to seek protection. Therefore, because a remedy is "available," even though it may be less protective or result in no recovery in a particular case, the provisions of this Act would not apply.

It is important to note, however, that the availability of a remedy to protect one type of federal health and safety interest does not negate the need for coverage under this Act if no remedy is available to protect another equally-important federal health or safety enforcement interest. To understand this concept, one must recognize that current federal whistleblower laws fall into two broad categories: Those that involve occupational health and safety and those that involve public health and safety.[24]

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[24] The term "public" health and safety also includes protection of the environment. Some statutes may include elements of each category. For example, the Federal Aviation Act sets standards for the safe operation of air transportation. Those standards will affect worker (occupational) and traveler (public) health and safety.

With regard to existing occupational whistleblower laws, the Committee intends for this Act to apply to those workers who have no federal statutory remedy available to protect themselves from retaliation for "blowing the whistle" on occupational violations. That universe is relatively limited. The OSH Act provides a remedy for occupational whistleblowers who are within the jurisdiction of that Act. According to the Bureau of Labor Statistics, as of 1988, the OSH Act protected 88.7 million workers, some 86 percent of the non-federal workforce. To avoid duplication of coverage, the OSH Act's jurisdiction is limited to those areas which are not subject to occupational health and safety regulation by another federal agency. 29 U.S.C. 653(b)(1). Many of the workers protected by other federal agencies also have statutory occupational whistleblower protection remedies available. *See e.g.*, Surface Transportation Assistance Act, 49 App. U.S.C. 2305 (over 1.5 million interstate truck and bus operators); Federal Mine Safety and Health Act, 30 U.S.C. 815 (354,000 miners); Federal Railroad Safety Authorization Act, 45 U.S.C. 441 (299,000 railroad workers). But there are workers in a number of industries where the federal government regulates occupational health and safety [25] who lack any federal statutory whistleblower protection. For example, the Federal Aviation Administration regulates occupational safety and health for nearly 650,000 aviation workers, but the enabling statute, the Federal Aviation Act, does not include a whistleblower protection provision. The Committee intends for this Act to fill that gap in coverage so that aviation workers will be able to protect themselves from retaliation.

The Committee is aware of similar gaps in coverage for occupational whistleblowers whose working conditions are regulated pursuant to statutes that do not include whistleblower protection provisions. The Committee has identified a number of those statutes in Section II.C.(2) of this report. The Committtee intends for this Act to close those gaps in coverage. The Committee acknowledges that it may not have identified all the current gaps in coverage for occupational whistleblowers and does not intend the statutes identified to be considered the exclusive provisions covered by this Act.

The more significant gaps in whistleblower protection are found in those statutes that protect the public health or safety. Although a review of the statutes listed in section 3(4) of the Act indicates that the majority of existing whistleblower protection statutes provide remedies for individuals who are retaliated against for helping to enforce public health or safety laws, there are a number of statutes that lack such protection. It is important to note that a whis-

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[25] The Act in no way creates or modifies any substantive standards relating to either occupational or public health or safety. All it is designed to do is ensure that workers will have a remedy against retaliation for helping further existing standards. Thus, there may be workers who lack a whistleblower remedy, but whose working conditions are completely unregulated by the federal government. For example, there is no occupational safety and health coverage for state and local employees in the 27 states that operate within the federal (non-state plan) OSHA system. *See* 29 U.S.C. 652; 667(c). This Act does not create occupational safety and health standards for those workers. Therefore, providing those workers with a whistleblower remedy for disclosing violations of federal occupational safety and health standards should have little practical effect. However, as discussed more fully below, those same state and local employees may be covered by federal public health or safety standards. If they lack a remedy for helping enforce existing public health or safety laws, then affording them protection under this Act would be meaningful new protection.

tleblower may have a federal statutory remedy available for reporting an occupational health or safety violation, but lack any federal statutory remedy for helping enforce an equally-important public health or safety concern. In that situation, a gap in coverage exists which the Committee intends for this Act to close. For example, if a worker in a poultry processing plant is retaliated against for reporting to an OSHA inspector on an occupational violation that could endanger workers, that worker would file a complaint under section 11(c) of the OSH Act. This Act would not apply to that situation. If that same worker at the same poultry processing plant is retaliated against for reporting a violation of federal food sanitary standards that could endanger consumers to the United States Department of Agriculture inspector, that worker currently has no federal remedy for that particular act of retaliation.[26] In the latter case, the Committee intends the provisions of this Act to apply. The fact that the worker had protection for reporting the occupational violation does not bar the worker from relying on this Act for protection for reporting the public health or safety violation.

Section 3(6) defines "Federal health or safety law" to include any federal law, regulation, rule or order "a primary purpose or effect of which is to create or establish or authorize the creation or establishment of health or safety standards." That definition further limits the scope of coverage of the Act. The Committee intends to protect workers who "blow the whistle" on health or safety violations. The Act does not extend protection to workers who help expose waste, fraud, or abuse. Such actions may have merit, but the Act focuses on the enforcement of health and safety laws, a compelling public policy purpose that is one of the core functions of government.

In addition, the definition in section 3(6) further limits coverage to those laws that involve health or safety standards. The focus on health or safety standards was one of the key changes incorporated in the substitute amendment adopted by the Committee. In the Act, as introduced, "Federal health or safety laws" were defined to include federal laws "a primary purpose or effect of which is to protect health or safety." Opponents of the Act charged that this definition could encompass such laws as the National Labor Relations Act and thus this Act really was intended to constitute wholesale labor law reform. These charges were both fanciful and wrong.

The Committee has adhered to the principles of the ACUS recommendation. ACUS expressly provided that its recommendation on health and safety whistleblower protection was not intended to "affect the existing jurisdiction of the National Labor Relations Board." ACUS Recommendation, reprinted in S. 436 at 199, n. 2. Thus, this Act was not designed to have an effect on the National Labor Relations Act or the operation of the National Labor Relations Board. To remove any lingering doubts about this issue, the Committee adopted the new definition in section 3(6) to focus atten-

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[26] No remedy is available because there is no whistleblower protection provision in either the Poultry Products Inspection Act, 21 U.S.C. 451-470 or the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301-393. For that matter, the Committee is unaware of a whistleblower protection provision in any statute regulating food and animal safety or health under the jurisdiction of either the United States Department of Agriculture or the Food and Drug Administration. The Committee intends for this Act to close such a glaring loophole.

tion on health or safety standards. No such standards are created or authorized under the National Labor Relations Act. The meritless argument that this Act somehow constitutes labor law reform should now be put to rest.

Thus, under the definition in section 3(6), a federal law that is animated by health or safety concerns, such as (1) a law to establish a safety study commission; (2) a funding statute designed to further health or safety; or (3) a statute that simply lists health or safety among its generic objectives but does not create or authorize the creation of health or safety standards, is not included in the Act. Therefore, a worker who is retaliated against for reporting a violation of such non-standard setting federal health or safety law would be unable to rely on the provisions of the Act, even if there was no other available federal statutory remedy.

Despite these limitations of the definition of "federal health or safety law," the Committee is aware of a significant number of federal statutes [27] that create or authorize public health or safety standards that also lack any protection for whistleblowers. In section II.C.(3) of the report, the Committee, with the assistance of the Congressional Research Service, identified a number of federal statutes that protect a federally-recognized public health or safety interest but do not include a whistleblower protection provision. Whistleblowers who help enforce the public health or safety standards created by or promulgated pursuant to these particular statutes will be able to rely on this Act for protection against retaliation.

The Committee acknowledges that it is quite possible that additional federal health and safety statutes exist that do not provide any remedy for whistleblowers. In determining whether additional gaps exist, one must return to the basic principle underlying the Act: if a health or safety activity is sufficiently charged with the public interest in the first place to warrant federal regulation, then it is important enough to warrant federal protection for those workers who help enforce the regulation. The Committee intends that principle to be the touchstone for adjusting the exact contours of the scope of coverage of the Act.

It is important to clarify two additional aspects of the definition of "employee" in section 3(2). The term includes a "former employee." The Committee learned about the problem of "blacklisting" which is one form of retaliation where a former employer tries to ruin the future employment opportunities for a former employee who reported health or safety violations. As discussed more fully below, blacklisting a worker who engaged in protected conduct is one form of employment discrimination that is prohibited by the Act. The prospective employer does play some role in blacklisting

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[27] Under section 3(6) of the Act, state laws that are part of a state plan to implement a federal health or safety law would be included as "federal" health or safety laws. For example, the OSH Act allows a state to administer occupational safety and health if it adopts a state plan with protections at least equivalent to federal protections. The state law, in effect, is the same as the federal law but the state agency is allowed to administer it. In such cases, where the federal law allows for a federally-approved state plan to displace the existing federal health and safety law, the Committee intends to protect whistleblowers who help enforce that federally-approved state law. Of course, if the federally-approved state plan also includes a remedy for whistleblowers as part of the state plan (as is the case with OSH Act state plans), then there is no gap in coverage and the provisions of this Act would not apply.

by not hiring the former whistleblower, but the retaliation is initiated and controlled by the former employer. By including the term "former employee" in section 3(2), the Committee intends to provide a whistleblower with a remedy for blacklisting against the former employer.

The definition of "employee" in section 3(2) also does not draw distinctions among different types of employees. Whistleblowers can be blue-collar laborers, supervisors, or top-level executives. The Committee does not intend to limit the application of this Act to a particular category of worker. Moreover, this Act does not exclude professional employees, like physicians or attorneys. Those professionals, as employees, may well have an opportunity to report violations of safety and health requirements that could protect many people in society. They should receive protection from retaliation. At the same time, those professionals may operate in a special relationship such as the attorney-client relationship, that prohibits disclosure of information. It is not the Committee's intent to override those common-law privileges nor to absolve those employees who violate them in the name of whisteleblowing. The Committee recognizes that this approach regarding common law privileges is consistent with the Administration's position. *See* Davis Letter at 7.

Sections 3(3) and 3(8) contain a significant limitation on the scope of this legislation by excluding the United States from the definitions of "employer" and "person" respectively. The Committee has excluded federal employees from the protection of this Act simply because they already have whstleblower protection under the Civil Service Reform Act, as amended by the Whistleblower Protection Act of 1989, P.L. 101-12. Because this Act is designed to close gaps, not create duplicative protection, there is no need to protect federal employees who are covered by the Whistleblower Protection Act of 1989.

This exclusion, however, is not intended to affect employees of federal contractors, who otherwise would be protected by the Act. Employees of private employers which hold contracts with the United States are not employees of the United States. The Occupational Safety and Health Act excludes the United States from its definition of "employer," 29 U.S.C. 652(5), but employees of federal contractors are protected by the OSH Act. Likewise, the Committee intends for such employees, including individuals employed by the contractor at government-owned, contractor-operated (GOCO) facilities, to be protected by the Act if they fall within one of the gaps of coverage. Similarly, the Act also protects employees of the United States Postal Service and government-owned corporations who are not covered by the existing federal whistleblower laws.

C. Protected activity

Section 4(a) of the Act prohibits discrimination against any employee for engaging in protected activity. The Act is directed at discharge or any other manner of discrimination with respect to the employee's compensation, terms, conditions or privileges of employment. The Committee intends to follow the Department of Labor's existing regulations for handling whistleblower complaints as a guide for the types of personnel actions that are prohibited. Under those regulations, the Department will find a violation of an exist-

ing whistleblower protection provision if "[a]ny person . . . intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee" who has engaged in protected conduct. 29 CFR 24.2(b).

The Committee seeks to emphasize that section 4(a) does not confer any additional employment rights to employees engaged in protected conduct. The Act merely prohibits discrimination based on protected activity. The Committee endorses current Department of Labor policy on this issue:

> The overarching policy consideration is whether employees engaging in whistleblower activities have been treated less favorably, because of these activities, than other employees engaged in comparable activities.
>
> In our view, the touchstone should be that employees that engage in responsible whistleblower activities should be treated the same—neither better nor worse—as similarly situated employees. This determination should be based on the facts of each case, the actions of the employer and the employee and any relevant policies, agreements, or practices.

Davis Letter at 4, 5.

Section 4(a) also lists those activities that are subject to protection: (1) simple disclosures of information that the employee believes evidences a violation of a federal health or safety law; (2) initiation, assistance or participation in a federal agency proceeding to administer, enforce or amend a federal health or safety law; and (3) refusal to engage in an illegal action or perform extremely hazardous work that poses a reasonable, bona fide threat of serious injury to personal or public health or safety.

The Committee recognizes that section 4(a) protects largely the same types of conduct as are protected under existing federal whistleblower statutes administered by the Department of Labor. Thus, the Department already has developed a body of case law, regulations and policies in this area. Section II.D. of this report discusses some of the current Department of Labor practices in this area. Unless otherwise noted below, the Committee intends to apply the current practices of the Department of Labor to types of conduct protected by section 4(a). For example, the Committee recognizes that advance retaliation is wrong. Thus section 4(a) protects whistleblowers who are retaliated against because they demonstrate an intent to disclose information or an intent to initiate, assist or participate in a proceeding. Such protection for "attempted" whistleblowing is common under existing federal whistleblower protection statutes administered by the Department of Labor. *See e.g.*, Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Toxic Substances Control Act, 15 U.S.C. 2622.

In another example, under current Department of Labor whistleblower practice, "an employee who brings a safety or health hazard to the attention of the employer is protected from retaliation to the same extent as an employee who complains to the Government." Dole Letter at 5. *See also* S. 2095 Hearing at 64-65 (testimony of Assistant Secretary of Labor Fred W. Alvarez). The Committee intends for this current policy position to apply to this Act. *See also*

Donovan v. *Diplomat Envelope Corp.*, 587 F. Supp. 1417 (E.D.N.Y. 1984), affirmed, 760 F.2d 253 (2nd Cir. 1985) (cited by Assistant Secretary of Labor Fred W. Alvarez at S. 2095 Hearing at 65 as a decision summarizing the range of protected disclosures under the OSH Act).

With regard to protections for refusal to engage in illegal or extremely hazardous activity, the language of section 4(a)(3) generally tracks the refusal to work language of the Surface Transportation Assistance Act, 49 App. U.S.C. 2305(b). That tracking was deliberate because the Committee intends to apply the current practices and precedents under the Surface Transportation Assistance Act to this Act.

On one key issue, however, the Committee intends section 4(a)(3) to be even more restrictive than the Surface Transportation Assistance Act. Section 4(a)(3) requires advance notification and an opportunity for correction, where possible, in all refusal to work situations. Under an administrative interpretation of the Surface Transportation Assistance Act, no advance notification is required before refusing to violate a truck safety standard. See *Le Blanc* v. *Fogleman Truck Lines*, 89-STA-8 (Secretary of Labor, Dec. 20, 1989).

The more restrictive provision of this Act underscores the Committee's intent to target those limited circumstances where an employee should be allowed to refuse an assigned task from the employer. Current federal whistleblower law does not authorize or condone employee insubordination. *See, e.g.*, *Dunham* v. *Brock*, 794 F.2d 1037 (5th Cir. 1986). This Act follows the federal law model in that regard.

Opponents of this bill have argued that refusal to work protection will transform every employee grievance into organized, mass work stoppages. But there was no evidence presented to the Committee that existing law protections for refusal to work have led to abusive behavior by employees. The absence of specific examples is particularly noteworthy given that refusal to work protection has existed under the OSH Act for nearly two decades. There is no reason to believe that refusal to work protection under this Act will be any different from the protection under current law. But, as discussed in section II.D.(2) of this report, there are good reasons for such protection to be included in a bill designed to provide a shield for whistleblowers who currently have no protection from retaliation under federal law.

Section 4(b) provides that an employee may not agree to waive or modify the protections of this Act except through a settlement agreement supervised by the Secretary of Labor or by the court. There are two independent reasons for this provision. First, minimum employment standards, like child labor protections, minimum wage and plant closing notification, are not subject to waiver. Otherwise, employees could be coerced into giving away rights that national policy has prescribed as minimum standards of decency. Protection against discrimination for engaging in protected activity is another minimum standard of decency that should not be subject to waiver. *See also* 29 U.S.C. 1856 (no waiver of rights allowed under the Migrant and Seasonal Agricultural Workers Protection

Act, including no waiver of the whistleblower protection provisions of that law).

Second, although whistleblower protection prevents employment discrimination by the employer against the employee, the potential hazards exposed by whistleblowing affect the public. Thus any settlement of a whistleblower complaint filed under this Act must be consistent with the public's interest. For example, a private agreement by the whistleblower and the employer that prohibits the whistleblower from ever disclosing information about a public health or safety hazard to the government would not be in the public interest and should be void as against public policy. To ensure that the public is protected from such "gag agreements" or other private agreements against public policy, section 5(l) requires that the Secretary make findings that any settlement under the Act is "fair, adequate, reasonable, and in the public interest."

Section 4(c) provides an important limitation on protected activity by exempting from protection conduct that constitutes a deliberate violation of a federal health or safety law. The Committee seeks to emphasize that nothing in this Act should be construed to authorize, condone or protect illegal conduct. Evidence of such illegal conduct may be presented at any point in the proceedings authorized under the Act.

Moreover, the Committee does not intend to encourage or authorize the improper disclosure of trade secrets or classified information. Once again, the Committee defers to current practice under the existing whistleblower laws administered by the Department of Labor. Under current practice, for example, there is no explicit exception from protection for disclosure of trade secrets nor should there be. Trade secrets are disclosed to the government in a number of circumstances to protect the public. A blanket exception from whistleblower protection for trade secret disclosure would allow potential violators of health and safety laws to label all potentially damaging information as a "trade secret," thereby insulating it from review. On the other hand, the Committee accepts the Department of Labor's position on this issue:

> We certainly do not believe, however, that an employee who discloses trade secrets directly to the general public should be immunized from legal action on the grounds that the disclosure revealed safety or health violations, because such sensitive information could have been directed to a government agency with authority to take the necessary steps to correct the alleged deficiency.

Davis Letter at 7–8. The Department adopts the same position with regard to classified information, id. at 8, and the Committee concurs.

D. Procedures/Remedies

As discussed in section II.E.(1) of this report, ACUS recommended that enforcement and administration of whistleblower protection laws should be centralized in the Department of Labor. The committee adopts the ACUS recommendation and centralizes enforcement within the Department of Labor. This choice will lead to more efficient and effective administration because of the existing

expertise of the Department. Moreover, it recognizes the need for independent employment experts to handle these complaints, rather than officials with the agency responsibility for the underlying substantive safety program. It is important to understand that whistleblower protection is a question of employment law, not an issue about the underlying technical safety requirements. As the ACUS Report indicates "the whistleblowing statutes do not require that the complainant's safety concern is technologically 'correct', but rather that it is merely reasonable in the circumstances." ACUS Report, reprinted in S. 436 Hearing at 140. The sole issue in a whistleblower protection case is determining whether an adverse employment action was taken for legitimate reasons or for retaliatory reasons. If the Department of Labor, in the course of deciding whether there has been prohibited discrimination, needs specific, technical information, it can rely on expert evidence provided by the substantive program agency.

Current law recognizes the split between the employment issue and the underlying safety issue. Of the thirteen existing federal statutes containing whistleblower protections where investigative authority is lodged in the Department of Labor, the substantive safety authority under ten of those statutes is outside the Department of Labor. For example, the Environmental Protection Agency is the program agency responsible for the Clean Air Act, but the Department of Labor administers the whistleblower protection provision of that Act. The Department of Labor has no expertise in the technical standards of air pollution, but it does have the expertise to determine if the employment relationship was abused to hinder the furtherance of a recognized public policy.

Congress has entrusted the Department of Labor to administer whistleblower protection in such diverse, technical areas as nuclear safety, interstate truck and bus safety, and environmental protection. The Committee intends for the Department to build on its expertise to handle whistleblower complaints in some equally technical areas that would be protected by this Act, such as food safety, aviation safety, and consumer product safety.

ACUS recommended a traditional administrative adjudication approach for processing whistleblower complaints, patterned after the Administrative Procedure Act (APA). The ACUS recommendation on this point is set out in Section II.E.(2) of this report.

Sections 5 and 6 follow each specific point of the ACUS recommendation. Under section 5(b) the whistleblower is directed to file a complaint with the Secretary of Labor. Section 5(c) provides that the Secretary will create or designate an office within the Department to conduct investigations. The Committee notes its preference for the creation of an independent whistleblower investigation office, but provides the Secretary with discretion to designate an existing office to perform the investigation function. The investigating officer will make findings of fact and issue a preliminary order. If neither party—the whistleblower or the person named in the complaint—challenges the investigator's order, then it will be a final order, not subject to judicial review. However, under section 5(d), either party has the right to request a formal on-the-record APA hearing before an administrative law judge within the Department of Labor. Upon completion of the hearing, the adminis-

trative judge will issue a decision containing findings of fact, conclusions of law and a remedy, if a remedy is appropriate. That decision will be designated the final order of the Secretary of Labor, subject to judicial review, unless the Secretary agrees to review it, in which case, the Secretary will issue a final order after review. Under section 5(k), any person adversely affected or aggrieved by the final order has the right to seek judicial review in the courts of appeals. Section 6 provides that the Secretary or the party on whose behalf an order is issued, including subpoenas issued during the course of proceedings, will be able to enforce that order through the district courts.

Using an administrative procedure to adjudicate these cases not only comports with the ACUS recommendation, it also is consistent with a number of existing federal whistleblower protection laws. For example, the Surface Transportation Assistance Act follows the same administrative adjudicative approach. Department of Labor administrative law judges, along with the Office of Administrative Appeals which assists the Secretary of Labor, are experienced in processing and reviewing whistleblower cases.

This Act does not require the whistleblower to exhaust other available procedures, including internal employer mechanisms before filing a complaint with the Department of Labor. The overwhelming majority of current federal whistleblower laws do not require such exhaustion. ACUS Report at Table 5, reprinted in S. 436 Hearing at 181–82. Requiring exhaustion of internal private sector remedies is akin to providing advance notification of the potential violation to the employer. As discussed above, in section II.D.(1) of this report, requiring advance notification could chill disclosures of valuable information. Similarly, requiring exhaustion of internal remedies also could chill such disclosures. Therefore, requiring exhaution of remedies could adversely affect workers' ability to help the federal effort to enforce safety and health laws.

Moreover, requiring exhaustion of internal remedies is not necessary to encourage parties to settle cases without formal adjudication. Under current law, the parties are encouraged to settle their disputes. The Committee adopts the same position. Section 5(1) expressly provides for the use of settlement and alternative dispute resolution techniques to encourage informal dispute resolution. The Department of Labor also recognizes that requiring exhaustion of internal remedies is not appropriate. *See* Davis Letter at 6. Requiring exhaustion of internal remedies would be contrary to the terms of current federal law and to current enforcement practices by the Department of Labor. It also could undermine the underlying goal of encouraging cooperation in federal health and safety enforcement efforts.

Although exhaustion of internal remedies is not required, the Committee does place the burden of moving forward with the complaint squarely on the shoulders of the whistleblower. This is an important change in that it gives control of the case to the whistleblower. In contrast, under section 11(C) of the OSH Act, the complaint moves forward only if the Secretary of Labor, in her unreviewable discretion, decides to bring an action. Under that system, in fiscal year 1987, for example, only 25 actions out of some 2600 complaints—less than one percent—were filed by the Secretary.

See S. 2095 Hearing at 59, 133. Providing the whistleblower with control over his or her own complaint should lead to more effective whistleblower protection. The Department of Labor, however, should not be eliminated completely from participating in a case. In particular, under section 5(e), when the investigation office finds for the whistleblower, that office shall intervene to help defend its decision. It is important, after an official finding of retaliation, for the office that made the finding to support the victim of retaliation. Intervention by the investigation office does not mean that the whistleblower loses control of the case. The Act expressly provides that the whistleblower (or someone on the whistleblower's behalf) is not precluded from continuing to represent himself or herself after the investigation office has intervened. Moreover, calling for intervention by the investigation office in certain limited circumstances is not intended to affect current Department of Labor practices regarding discretionary intervention to address questions of policy.

With regard to remedies, section 5(i) of the Act follows the lead of recently-enacted laws by including compensatory damages as an available remedy in addition to reinstatement, back pay and benefits, attorney's fees and costs and equitable relief. However, the Act does not include an award of punitive or exemplary damages as a remedy that may be provided by the Secretary to the successful whistleblower complainant. As reported by ACUS, two whistleblower statues—the Safe Drinking Water Act, 42 U.S.C. 300j-9, and the Toxic Substances Control Act, 15 U.S.C. 2622—expressly provided for exemplary damages. ACUS Report, reprinted in S. 436 Hearing at 150. A case can be made in favor of such damages in particularly egregious circumstances, but the focus of this Act is to ensure that legitimate whistleblowers do not "suffer financially." Therefore, the Act provides for meaningful make-whole remedies to encourage legitimate whistleblowers to come forward, but it does not create additional financial incentives in the form of punitive damages.[28]

As discussed in section II.E.(3) of this report, standard make-whole remedies will have little impact if the whistleblower is devastated financially and personally while the complaint is pending. In order to ensure that the make-whole remedies in section 5(i) have meaning, section 4(c)(2) allows for interim relief in the form of temporary reinstatement pending final resolution of the complaint if the investigating authority determines that "there is reasonable cause to believe a violation of this act has occurred." That is the same standard for temporary reinstatement that exists under the Surface Transportation Assistance Act. 49 App. U.S.C. 2305(c)(2)(A). The standard for temporary reinstatement in this Act is arguably

[28] Section 6(a) does allow for exemplary damages in the limited circumstances where the Secretary of Labor is forced to bring a civil action in district court to enforce an order. This is consistent with a number of current laws. *See* Toxic Substances Control Act, 15 U.S.C. 2622(d); Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(4); Clear Air Act, 42 U.S.C. 7622(d); and Energy Reorganization Act, 42 U.S.C. 5851(d). A recalcitrant party should pay exemplary damages in appropriate cases where it refuses to comply with an order and forces an enforcement action. Moreover, exemplary damages are authorized only in actions brought by the Secretary. Under section 6(b), in enforcement actions brought by either party no exemplary damages are allowed. Thus any exemplary damages awarded would be payable to the Secretary, not to the parties, and would provide no financial incentive for potential whistleblowers.

more stringent than the test for temporary reinstatement for whistleblowers under the Federal Mine Safety and Health Act. Under that provision, if the Secretary finds that a complaint "is not frivolously brought," there shall be "the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. 815(c)(2).

The Committee incorporates the more demanding test of the Surface Transportation Assistance Act in this Act for two reasons. First, it provides added protection for employers who will be required to reinstate only those whistleblowers who have demonstated the legitimacy of their complaint. Second, the Supreme Court has expressly upheld the constitutionality of the temporary reinstatement provisions of the Surface Transportation Assistance Act, *Brock* v. *Roadway Express*, 418 U.S. 252 (1987). The Committee intends to avoid any constitutional question by following the Supreme Court-approved standard for temporary reinstatement.

The constitutional issues surrounding temporary reinstatement also support the need for action-forcing mechanisms. Section II.E(4) of this report discussed in detail the policy and legal considerations surrounding the need to avoid delay in handling a whistleblower complaint.

The Act includes two action-forcing mechanisms to combat delay: (1) mandatory time requirements for each stage of the administrative process and (2) a limited window during which a whistleblower may bring a private right of action if the administrative process bogs down. These action-forcing mechanisms are direct responses to the general need to curb delay and the specific need to meet the constitutional requirements set forth in *Brock* v. *Roadway Express*.

The table below lists the time requirements in the Act:

TABLE 1.—COMPLAINT PROCESS TIME REQUIREMENTS

	Time period	Total days
Action:		
Complaint filed with Department of Labor	0	0
Investigation findings due, temp. reinstatement available	60	60
Period for either party to request a hearing	30	90
Administrative Law Judge (ALJ) required to complete hearing	180	[1] 270
ALJ decision due	60	[2] 330
Period for either party to petition Secretary for review	30	360
Secretary's final decision due	60	420
Period for either party to seek judicial review	60	480

[1] An additional five days is allowed to transmit the hearing request from the investigation office to the Office of Administrative Law Judges. Thus the ALJ may have up to the 275th day to complete the hearing. This transmittal period, however, does not change the time when the ALJ decision is due, which remains at 240 days from the time the hearing request is initially filed with the investigation office.

[2] At this point in the process, if, and only if, the ALJ has not issued a decision, the private right of action window opens for a 60-day period. If the employee does not bring an action in district court within this window period, or if the ALJ issues a decision before the case is brought, the employee will lose that opportunity for the remainder of the process.

The time periods are intended to be reasonable, but they are mandatory so as to limit the delay in final resolution. For example, the Administrative Law Judge has 240 days, some eight months, to conduct an administrative hearing and issue a final decision. A review of the case statistics of the Office of Administrative Law Judges indicates that for fiscal years under 1982 through 1987, there were 187 cases disposed of under the environmental whistleblower statutes administered by the Department of Labor. It took

an average of 162 days to resolve each of these cases. Therefore, the Committee expects that there should be more than adequate time under the Act to resolve and review carefully whistleblower complaints filed with the Department of Labor. At the same time, these time requirements are well within the 19-month range accepted by the Supreme Court in *Roadway Express*. While such a period of delay may be acceptable as a matter of law, the Committee does not believe such delays are acceptable as a matter of policy. Therefore, under this Act, the maximum period of delay between an initial order of temporary reinstatement and a final decision by the Secretary of Labor is 360 days—some 12 months.

As a further safeguard against delay, section 5(j) of the Act allows for an action in district court if the administrative process bogs down. If the Department of Labor meets the time requirements of the Act, there will be no opportunity for a private right of action. The Committee expects the Department to meet the time requirements in the great majority of whistleblower cases. Again, reviewing the caseload statistics from the Office of Administrative Law Judges, only 67 of 275 cases disposed of from October 1982 through February 1989, less than 25 percent of the cases, took longer than 240 days to decide. *See* S. 436 Hearing at 115. Therefore, less than 25 percent of current cases would have been eligible for the private right of action window. Even that conclusion overstates the possibility of private rights of action, because those cases were processed under a system where time constraints were merely "directory in nature." Thus, the action-forcing time periods prescribed in the Act should further limit the small number of cases where the added safeguard of a private action in district court is available. Moreover, if the complainant does not bring the private right of action within the "window period," the complainant loses that option and must continue to rely on the administrative process for a remedy. But the availability of a limited private right of action is an important option to protect victims of retaliation, who otherwise would have no ability to seek to expedite a decision when the preferred administrative approach is mired in delay.

Section 5(c)(4) adopts the identical burden of proof standard for hearings conducted under the Act as was incorporated in the Whistleblower Protection Act of 1989 for federal employee whistleblowers. Section II.E.(5) of this report discussed in detail the rationale for adopting the new burden of proof for federal whistleblowers and why that rationale applies equally to private sector whistleblowers. The Committee believes that adopting a more onerous burden of proof standard for whistleblowers under this Act would send the wrong message. It would signal to the public that Congress does not value the contributions of private sector whistleblowers who are helping enforce federal health and safety laws as much as the assistance of federal employee whistleblowers. Sending such a message would be contrary to the purpose of the Act as it would chill protected activity and hinder the ability to enforce federal health and safety laws.

Under Section 5(c)(4), the complainant has the burden to prove the prima facie case—to establish by a preponderance of the direct or circumstantial evidence that a protected activity was "a contributing factor" in the alleged adverse employment action. If the com-

plainant meets that initial burden, then the burden of proof shifts to the respondent to prove, "by clear and convincing evidence," that the alleged adverse employment action would have occurred even if the complainant had not engaged in protected activity. This showing is sometimes referred to as the "but for" test—would the adverse employment action not have occurred "but for" the complainant's engaging in protected conduct. The respondent must prove, by clear and convincing evidence, that there was a legitimate or valid reason for a personnel action that the complainant has proved initially was tainted by retaliatory animus. As is the case under current law, if the respondent meets that burden, the complainant still has the opportunity to demonstrate that the legitimate or valid reason is a mere pretext for retaliatory action.

Because section 5(c)(4) adopts the identical burden of proof standard as contained in the Whistleblower Protection Act of 1989, the Committee incorporates by reference the legislative history of that Act on that standard. For example, under the Whistleblower Protection Act of 1989, the term "a contributing factor"

> means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overcome that action.

135 Cong. Rec. S2780 (March 16, 1989) (Statement of Senator Carl Levin, Majority Floor Manager of the Bill). *See also id.* at S. 2788 (Statement of Senator Charles Grassley, lead co-sponsor of the bill) (contributing factor means "any factor which, alone, or in conjunction with other factors tends to affect or influence, in any manner, the personnel decision against."); Letter from the Honorable Dick Thornburgh, Attorney General to the Honorable Carl Levin (March 3, 1989), reprinted in 135 Cong. Rec. at H748 (March 21, 1989) (endorsing the burden of proof provision of the Whistleblower Protection Act of 1989). The Committee intends for the term "a contributing factor" to have the same meaning under this Act as it does under the Whistleblower Protection Act of 1989. Other questions involving the burden of proof in section 5(c)(4) should be resolved through a similar analysis.

E. Enforcement referrals

The Committee recognizes that in addition to protecting private sector whistleblowers from retaliation there is a need to protect the public health and safety by ensuring that the program agency responsible for the underlying health or safety problem exposed by the whistleblower is apprised of that problem as soon as possible. Thus section 5(b)(2) requires the Secretary of Labor to forward a copy of each retaliation complaint filed under the Act to the relevant program agency as soon as it is filed. In this way, if the whistleblower's action has not alerted the program agency already, it will be on notice immediately of any potential health or safety problems, so as to be able to take prompt, appropriate action.

As a further safeguard, section 7(a) provides that all final decisions, including settlements approved by the Department of Labor, resolving complaints under the Act should be transmitted to the appropriate program agency. Even though the Department of Labor proceeding focuses solely on employment discrimination issues, the substantive agency may benefit from the Department's findings of fact, including findings of credibility, in assessing the nature of the underlying problems exposed by the whistleblower. Section 7(b) makes clear, however, that the Department of Labor may not usurp the authority of the program agency to deal with the underlying health or safety problem. The program agency retains full authority to take whatever action is necessary to address the substantive problem.

If, after receiving the final decision, the program agency needs to take any action to enforce the law, that agency should do so within 30 days and inform the parties what action was taken. This reporting requirement in section 7(a) has a twofold purpose. It allows the public to know what corrective action, if any, was taken to eliminate a health or safety problem. It also sends a message to future whistleblowers that if problems are exposed, there will be corrective action taken. Workers will be reinforced that there is a good reason to continue to help the federal enforcement effort because whistleblowing could make a difference for public health and safety. That is an important message to send, particularly given the skepticism among workers about the efficacy of whistleblowing.

F. Preemption

The primary goal of this Act is to ensure that whistleblowers, who currently lack federal statutory protection, are not discriminated against for helping the federal government enforce health and safety laws. Existing state remedies will help achieve that primary goal as "additional, and possibly at times more effective" means of stemming discrimination that "might otherwise impede" the federal government's safety and health enforcement effort. *See* Brief for the United States as Amicus Curiae in *English* v. *General Electric Co.*, No. 89-152 (Filed January 2, 1990). Thus, for the very reasons articulated by the Department of Justice, and supported by the unanimous Supreme Court in *English* v. *General Electric Co.*, No. 89-152 (June 4, 1990) (as discussed in section II.G. of this report), it would be inappropriate to preempt state laws under this Act. Section 8(b) incorporates the Committee's intent that the rights and remedies provided for under the Act are in addition to, not in lieu of, rights and remedies provided under State law, which includes both statutory and common law. The Committee does not intend to alter or affect in any way existing State law rights and remedies. Section 8(c) applies the same policy to contractual rights and remedies.

G. Uniformity

Section 8(a) creates limited, uniform procedures by expressly superseding existing federal whistleblower protection law in two areas: statute of limitations and subpoena power for the Secretary of Labor. As discussed in section II.H.(1) of the report, there is a

consensus on the need for a more rational statute of limitations period.

Section 5(a) follows the ACUS recommendation by providing for a uniform 180-day statute of limitations. A timely complaint may be filed within 180 days after either the retaliation occurs, the adverse employment action takes effect, or the complainant first learns or reasonably should have learned of the retaliatory conduct. This uniform standard will remove an unnecessary barrier to effective whistleblower protection. In addition, section 5(b)(3) tries to alleviate any confusion by creating a central filing function within the Department of Labor. If a whistleblower files a timely complaint with the Secretary of Labor, that filing will be deemed to have satisfied the filing requirements under existing federal health and safety whistleblower laws. The Secretary will direct the complaint to the proper investigative office, either within or outside the Department of Labor. The central filing function, however, does not provide the Secretary with any authority to investigate or adjudicate complaints that are otherwise outside her current jurisdiction.

There is also agreement about the need for enforceable subpoena power to support the Department of Labor's investigative and adjudicative responsibilities. Section 5(f) provides explicit subpoena power to the Secretary of Labor for all whistleblower proceedings currently within the jurisdiction of the Department of Labor. The subpoena power provided for in the Act is derived from the Federal Trade Commission Act and is identical to the power the Secretary currently has under the Fair Labor Standards Act. The Committee intends for the Secretary to exercise the subpoena power to support the investigative and adjudicative responsibilities of the Department of Labor under this Act and the existing federal health and safety whistleblower provisions within the jurisdiction of the Department. A subpoena, like any other order issued under the Act, will be enforceable through actions in the district court, as provided for in section 6 of the Act.

VI. VOTES IN COMMITTEE

Votes taken during Committee consideration of the legislation were as follows:

1. The Committee accepted by voice vote an amendment in the nature of a substitute offered by Senator Metzenbaum.

2. The Committee voted to adopt and report S. 436 as amended, as an amendment in the nature of a complete substitute, by rollcall vote, 8–7.

YEAS	NAYS
Mr. Kennedy	Mr. Hatch
Mr. Pell	Mrs. Kassebaum
Mr. Metzenbaum	Mr. Jeffords
Mr. Dodd	Mr. Coats
Mr. Simon	Mr. Thurmond
Mr. Harkin	Mr. Durenberger
Mr. Adams	Mr. Cochran
Ms. Mikulski	

VII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 11, 1990.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 436, the Employee Health and Safety Whistleblower Protection Act, as ordered reported by the Committee on Labor and Human Resources on April 25, 1990. This bill could affect the federal budget by adding investigative and hearing costs. It could also affect the budgets of state and local governments by adding settlement costs.

S. 436 would provide protection to employees of certain private firms against employer retaliation for complaints about occupational and public health and safety hazards. This bill would extend protection to those employees who are not currently protected under 16 existing federal health and safety laws including the Occupational Safety and Health Act of 1970 (OSHA), the Public Health Service Act, and the Surface Transportation Assistance Act of 1982. This bill also would extend the statute of limitations for filing a complaint to 180 days for all federal whistleblower protection laws. This bill would not affect federal employees, wo are already protected under existing law, and would apply only to those complaints filed on or after the effective date of this bill.

The Department of Labor (DOL) currently is required to investigate all complaints filed under the existing laws mentioned above. The DOL then determines whether the complaint has merit and issues a preliminary order that specifies the remedies, if any. Any party involved in the complaint may request a hearing with the Office of Administrative Law Judges in the Department of Labor. These procedures also would apply to complaints filed under this bill.

It is difficult to estimate the increase in investigation and hearing costs that would result from the enactment of the bill; however, additional costs are not expected to be large. This bill could increase the number of complaints filed because the time for filing a complaint under existing federal health and safety laws would be increased and because protection is extended to more employees.

There are certain state and local employees in 27 states who are not protected under existing federal health and safety laws that would be protected under this bill. The budgets of these 27 state and local governments also could be affected if complaints filed under the bill result in judgments against them. Relief could include back pay, lost benefits, and compensatory damages. CBO is unable to estimate how many future complaints would be filed and how many of them would result in judgments against state and local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cory Leach (226-2820).

Sincerely,

ROBERT D. REISCHAUER,
Director.

VIII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 436 is made:

A. Estimated Number of Individuals and Businesses Regulated and Their Groups or Classifications

S. 436 protects employees who currently have no protection from retaliation for blowing the whistle on occupational and public health and safety hazards. The legislation extends the statute of limitations for filing a complaint to 180 days for existing federal whistleblower laws, but otherwise does not expand protection under those laws. The legislation would not apply to federal government employees, who have existing protection under the Civil Service Reform Act, as amended by the Whistleblower Protection Act of 1989. Because public health and safety laws may apply throughout the economy, in theory, S. 436 could apply to the entire non-federal workforce and employer community. In practice, the number of workers who disclose violations is a tiny fraction of the workforce. Many of those workers already have protection under existing federal whistleblower laws and would not be protected by this Act. For example, according to the Bureau of Labor Statistics, there are nearly 104 million non-federal workers and the whistleblower provisions of the Occupational Safety and Health Act protect nearly 89 million of those workers from retaliation when they complain about occupational safety and health violations. Moreover, the number of aggrieved workers eligible to file a complaint because of subsequent retaliation is a small percentage of those workers who make disclosures.

B. Economic Impact on the Individuals, Consumers, and Businesses Affected

The Committee is unable to determine the precise economic impact the legislation would have on affected individuals, consumers and businesses. S. 436 does provide "make-whole" remedies for individuals that could include back pay, lost benefits and compensatory damages. The legislation will not create incentives for financial gain, but attempts to ensure that individuals will not suffer financially for engaging in protected activities. Businesses could be affected if complaints filed under S. 436 result in judgments against them. On the other hand, exposure of potential health or safety violations should lead to correction of those problems which, in turn, could result in significant economic and social benefits to consumers, employers and employees. It should be noted that the Congressional Budget Office was unable to estimate how many future complaints would be filed and how many such complaints would result in judgments against businesses.

C. Impact of the Act on Personal Privacy

S. 436 does allow the investigation office within the Department of Labor to make available to either party to the proceeding investigative material compiled by that office. The legislation protects personal privacy concerns by expressly subjecting the disclosure of such material to the requirements of the Privacy Act, 5 U.S.C. 552a.

D. Additional Paperwork, Time, and Costs

Enactment of S. 436 is not likely to result in significant additional paperwork, time or costs. The legislation could increase the number of complaints filed because the time for filing a complaint under existing federal health and safety laws would be increased and because protection is extended to more employees. In this regard, it is important to note that the Congressional Budget Office concluded that any additional costs are not expected to be large.

IX. SECTION-BY-SECTION ANALYSIS

Short title

Section 1 establishes the short title of the Act as the "Employee Health and Safety Whistleblower Protection Act."

Findings

Section 2(a) lists the findings: (1) employees who report unlawful or hazardous activities are performing an important public service; (2) employees should be able to report such activities without fear of reprisal; and (3) current federal laws designed to protect employee health and safety whistleblowers are inadequate.

Purpose

Section 2(b) states the purpose of the Act: (1) to extend protection to employee health and safety whistleblowers who currently have no federal statutory remedy; (2) to create a uniform 180-day statute of limitations for filing whistleblower complaints; (3) to provide the Secretary of Labor with subpoena power to investigate complaints; (4) to provide a limited private right of action for health and safety whistleblowers without current federal statutory remedy; and (5) to ensure that substantive health and safety complaints are referred to the appropriate federal agency.

Definitions

Section 3(1) defines the term "commerce" as trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof.

Section 3(2) defines the term "employee" as any individual employed by an employer, including a former employee, who has been discharged or discriminated against for any of the conduct recognized as protected activity under the Act and who currently has no remedy available under an existing federal whistleblower protection law.

Section 3(3) defines the term "employer" as a person engaged in a business affecting commerce who has employees. The term "employer" includes a government corporation, the U.S. Postal Service, a State or subdivision of a State, or an interstate governmental agency, but does not include the United States. Agents or employers of an employer are considered "employers."

Section 3(4) defines "existing federal whistleblower protection law" by listing those sections of 16 federal statutes that protect employees from retaliation for reporting unalwful or hazardous activities.

Section 3(5) defines the term "Federal agency" as each authority of the Government of the United States, whether or not it is within or subject to review by another agency, or any interstate governmental agency or commission. The term also includes a state or local agency or commission. The term also includes a state or local agency that is authorized by federal law to administer or enforce a federal health or safety law.

Section 3(6) defines the term "federal health or safety law" as any federal law, regulation, rule, or order, a primary purpose or effect of which is to create or establish or authorize the creation or establishment of health or safety standards. The term includes any State law, regulation, rule or order enacted as part of a State plan to carry out a federal health and safety law.

Section 3(8) defines the term "person" as one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, organized groups, government corporations and the United States Postal Service. The definition expressly excludes the United States.

Section 3(9) defines the term "proceeding" as a trial, hearing, investigation, inquiry, inspection, or formal administrative action involving a federal agency.

Section 3(11) defiens the term "Secretary" as the Secretary of Labor.

Section 3(12) defines the term "State" to include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam and all trust territories and possessions.

Section 3 also provides cross-reference definitions for the terms "investigation office" and "respondent."

Protected activity

Section 4(a) prohibits discrimination against an employee because that employee (1) discloses an activity that the employee believes evidences a violation of a federal health or safety law; (2) initiates, assists, or participates in a proceeding before a federal agency regarding an activity that the employee believes evidences a violation of a federal health or safety law or which relates to enactment, administration, or enforcement of such a law; or (3) refuses to participate in an activity when such participation constitutes a violation of a federal health or safety law or when the employee has reasonable apprehension of serious injury to the employee, other employees, or the public due to such participation and, in either case, the employee has sought and been unable to obtain a correction of the illegal or dangerous activity.

Waiver

Section 4(b) establishes that an employee cannot waive the rights provided under this Act, except through the settlement mechanisms under this act or a court-supervised settlement.

Exemption

Section 4(c) provides that the protection afforded by the Act does not apply to circumstances where an employee deliberately causes a violation of a federal health or safety law.

Statute of limitations

Section 5(a) creates a unform 180-day statute of limitations for filing a complaint pursuant to this Act or an existing federal whistleblower protection law as defined in section 3(4) of this Act.

Complaint procedure

Section 5(b) allows any employee to file a complaint with the Secretary to redress a violation of the Act. The Secretary shall serve the complaint on the respondent and refer the underlying safety or health allegations to the appropriate federal agency.

Section 5(b)(3) creates a central complaint filing function whereby a person meets the 180-day statute of limitations under this Act and an existing federal whistleblower protection law by filing a timely complaint with the Secretary. If the Secretary does not have authority to process a particular complaint, the Secretary will refer it to the appropriate federal agency.

Investigation

Section 5(c)(1) requires the Secretary to create or designate an investigation office to investigate complaints. The Secretary must refer all complaints immediately to that office.

Section 5(c)(2) requires that the investigation office, within 60 days of receipt of the complaint, conduct an investigation, determine whether there is reasonable cause to believe the complaint has merit, and make findings of fact. If the investigation office finds reasonable cause to believe a violation of the Act has occurred, it shall issue a preliminary order providing for relief, including immediate, temporary reinstatement.

Section 5(c)(3) requires the investigation office to serve the findings on all parties, and to inform the parties of the right to request a hearing before an administrative law judge (ALJ). If no hearing is requested, the findings and order issue by the investigation office are final and not subject to judicial review.

Burden of proof

Section 5(c)(4) establishes the burden of proof for all hearings conducted under the Act. The complainant must prove, by a preponderance of the evidence, the protected activity was a contributing factor in the employment action. If the complainant meets that burden, the respondent must prove by clear and convincing evidence that the employment action would have occurred regardless of the complainant's participation in protected activity.

Hearing request

Section 5(d)(1) states the time for filing a hearing request: (1) within 30 days of receipt of the findings of the investigation office; or (2) if the investigation office has issued no findings on or before the 60th day of receipt of the complaint, within 30 days thereafter.

Section 5(d)(2) provides that the investigation office loses jurisdiction upon the filing of a hearing request by the complainant or when the filing period for a hearing request expires, whichever occurs first. Once the investigation office loses jurisdiction, either party may obtain any investigative material compiled by that office, subject to the limits of the Privacy Act.

Section 5(d)(3) directs the parties to file hearing requests with the investigation office, which will file such requests with the Office of Administrative Law Judges within 5 days.

Section 5(d)(4) establishes that a hearing request shall not stay any reinstatement remedy contained in a preliminary order.

Section 5(d)(5) states that if the investigation office has failed to make findings the time period prescribed, the complainant may seek a preliminary order for immediate, temporary reinstatement from the ALJ.

Intervention

Section 5(e) directs the investigation office to intervene on behalf of the complainant if the office finds the complainant has been discriminated against for engaging in protected activity. In all other cases, the investigation office shall make a written determination whether to intervene for the complainant, within 15 days after receipt of a hearing request. Intervention by the investigation office shall not preclude the complainant from obtaining separate representation.

Subpoena and rulemaking

Section 5(f) provides the Secretary with subpoena power identical to the power currently provided by the Federal Trade Commission Act for any hearing or investigation under this Act or any existing federal whistleblower protection law. The section also directs the Secretary to promulgate rules necessary to administer this Act, including any procedures for alternative dispute resolution.

Hearing procedure

Section 5(g)(1) directs the ALJ to complete the hearing within 180 days of receipt of a hearing request. Section 5(g)(2) allows all parties to have a reasonable opportunity for discovery and to be given written notice of the hearing at least 15 days in advance.

Section 5(g)(3–4) provide that the Administrative Procedure Act rules for adjudications should apply to the hearing and that all hearings shall be de novo, except that any preliminary order for immediate temporary reinstatement shall be enforceable.

Section 5(g)(5) directs that within 60 days after conclusion of the hearing, or within 240 days after the investigation office receives a hearing request, whichever is sooner, the ALJ shall issue a decision containing findings of fact, conclusions of law, and the remedy or-

dered. The ALJ shall serve the decision on the Secretary and all parties, along with a statement concerning the right to appeal.

Administration appeal

Section 5(h)(1) deems the ALJ's decision as the final order of the Secretary, subject to judicial review, unless a party petitions the Secretary for review or the Secretary orders review within 30 days after the issuance of a decision.

Section 5(h)(2) states that the Secretary shall issue a final order within 60 days after receipt of a petition for review. If the Secretary fails to act within the 60-day period, the decision of the ALJ will be designated as the final order of the Secretary.

Remedies

Section 5(i)(1) provides for the following remedies: (1) affirmative action to abate the violation; (2) reinstatement of the complainant to the complainant's former position, together with compensation, including back pay and lost benefits; (3) compensatory damages; and (4) equitable relief as necessary to correct any violation or make the complainent whole.

Section 5(i)(2) allows the Secretary to assess against the respondent all costs and expenses reasonably incurred by a successful complainant including attorney's fees.

Private right of action

Section 5(j)(1) creates a private right of action for the complainant against the respondent if the ALJ fails to issue a decision within 60 days after completion of the hearing or within 240 days after the investigation office receives a hearing request, whichever is sooner. In that limited circumstance, the complainant may file a civil action within 60 days in any United States district court with jurisdiction over the parties. The court shall not take jurisdiction if the ALJ issues a decision before the filing of the civil action. The complainant is barred from filing a civil action once the filing period has expired.

Section 5(j)(2) provides that the ALJ and the Secretary lose jurisdiction once the complainant files a civil action. The filing, however, does not stay a preliminary order unless ordered by the court. If the complainant does not file a civil action within the prescribed filing period, the ALJ and the Secretary retain jurisdiction to issue a final order subject to judicial review under section 5(k).

Section 5(j)(3) specifies that the Secretary shall notify the complainant of the opportunity to file a civil action when that opportunity becomes available.

Section 5(j)(4) allows the court to assess against the respondent all costs and expenses reasonably incurred by a successful complaint, including attorney's fees.

Section 5(j)(5) provides that either party may request that the ALJ transmit the complete evidentiary record compiled during the administrative hearing to the court. This request does not preclude supplementing the court record.

Judicial review

Section 5(k) provides that any person adversely affected by the Secretary's final order may obtain judicial review in the United States court of appeals. The petition for review must be filed within 60 days after the issuance of the final order. The court will apply the judicial review provisions of the Administrative Procedure Act. The petition does not stay any order of the Secretary unless otherwise ordered by the court. If the parties do not seek judicial review, a final order shall not be reviewable in any other proceeding.

Settlement or alternative dispute resolution

Section 5(l)(1) establishes that the investigation office shall attempt to reach a settlement between the parties. There cannot be a settlement without the written consent of the complainant, and without a finding by the Secretary that the settlement is fair, adequate, reasonable, and in the public interest.

Section 5(l)(2) states that the Secretary may use alternative means of dispute resolution to resolve the complaint, so long as all parties consent in writing. Information exchanged during the process of alternative dispute resolution is not admissible or discoverable in any other proceeding under the Act, absent the agreement of the parties. The use of alternative dispute resolution mechanisms tolls the time periods prescribed in the Act for up to 30 days.

Time computations

Section 5(m) provides that time computations, not otherwise provided for in this Act, shall be made in accordance with the Federal Rules of Civil Procedure.

Posting

Section 5(n) requires each employer to post a notice containing information the Secretary deems appropriate to effectuate the Act.

Enforcement

Section 6 states that if a person fails to comply with an order issued under this Act, the Secretary, or any person on whose behalf an order is issued, may file a civil action in the United States district court to enforce such an order. In an enforcement action brought by the Secretary, the court has authority to award injunctive and declaratory relief, along with compensatory and exemplary damages. In an enforcement action brought by any other person, the court has authority to award the costs of litigation, including attorney and expert fees, to the person who successfully sought enforcement.

Complaint referral

Section 7 requires the Secretary to serve each final order on any federal agency that may have jurisdiction over the underlying health or safety allegations in the complaint. Such agency shall take appropriate action regarding the allegations. Within 30 days after taking such action, the agency shall inform the involved parties and the relevant committees of Congress as to any action

taken. This section is not intended to limit the substantive authority of any other federal agency.

Effect on other rights and remedies

Section 8 establishes that Congress intends this Act to supersede existing federal whistleblower protection laws only insofar as such laws: (1) may provide a statute of limitations for filing complaints that is less than 180 days; and (2) do not authorize subpoena power for the Secretary. The rights and remedies provided to employees by this Act are in addition to, not in lieu of, any other rights and remedies as provided by State law or by contract.

Effective date

Section 9 provides that this Act shall become effective on the date of enactment, but that it will apply only to those complaints filed on or after the effective date.

MINORITY VIEWS ON S. 436

The Government Accountability Project, testifying in support of this bill at a hearing held last year, stated that S. 436 "will be the cornerstone for a modern law of dissent in the private labor force." This seems an accurate assessment of this bill, which modestly purports to close certain gaps in existing whistleblower coverage. But, in fact, this bill far exceeds the parameters of existing whistleblower protections in both the scope of activity it protects and the procedures and substantive remedies it provides.

More than a dozen existing federal whistleblower laws currently cover a variety of industries. But many or most of these laws do not contain protections comparable to those that this bill would apply to industries not now covered. Thus, while this bill has been described as being "patterned after current law," there is no pattern under current law of which we are aware that matches this broad legislation.

Further, the only legislative record created by this committee has been to show that there are certain federal health and safety laws that do not now have their own whistleblower provisions. These are the so-called "gaps" that this bill is allegedly intended to fill. In addition, the bill, following the recommendation of the Administrative Conference of the United States, and responding to other testimony, would establish a uniform 180-day statute of limitations and provide the Secretary of Labor with broad subpoena powers in invetigating whistleblower complaints.

It appears, however, that this bill goes much further than extending whistleblower coverage to employees not already covered by existing whistleblower laws. Most notably, this bill would provide millions of employees, including those covered by existing whistleblower laws, with a new, expansive, and virtually unprecedented right to refuse to work. It does so despite the total absence of a record to support such a far-reaching change in employment law. This is a change which seeks to protect employee conduct which does not even constitute whistleblowing activity.

We do not take issue with the goal espoused by sponsors of this legislation to close certain gaps in current whistleblower laws that have left employees in certain identified industries without any protection for legitimate whistleblower activities. The purpose of a whistleblower law is, or at least should be, the protection of employees who bring legitimate complaints to the attention of appropriate officials with authority to act on those complaints. Such disclosures serve the public interest and should be encouraged as well as protected.

The purpose of a whistleblower law is not, however, to give a new and expansive cause of action to disgruntled or incompetent employees against whom employment actions are taken. Such laws

should not make it difficult, if not impossible, for employers to defend such actions.

In our view, S. 436 in its current form, with its expansive definition of protected activity and its expansive procedures and remedies, is poor policy despite its stated intention.

1. *S. 436 would protect activity designed to do more than simply inform the appropriate authorities.* This bill's definition of protected activities is overly broad, going well beyond the level of protection needed to facilitate the enforcement of the laws allegedly being violated.

The rationale for having whistleblower protection is to provide justice to the individual employee while also removing obstacles to the orderly enforcement of the underlying law.

Certainly the filing of a complaint with the appropriate agency charged with enforcing that law meets the rationale, as does testimony in an enforcement proceeding conducted by that agency.

Yet this bill protects much more. For example, employees are protected under this bill not only if they actually blow the whistle, but also if they "demonstrate an intent" to do so. They're also protected if they "demonstrate an intent to participate or assist in a proceeding with respect to the enactment or amendment of a federal health or safety law." Further, this bill would appear to protect even disclosures to an employer's competitors.

To our knowledge, the extremely broad definition of protected whistleblower activity found in this bill has no counterpart in any existing whistleblower law. The use of this broader language virtually guarantees that this legislation would be used to pursue goals well beyond those supposedly served by whistleblower laws. Clearly, just the ambiguity of the terms used will ensure litigation not over simply whether an employee "blew the whistle" but over whether the employee "intended to do so."

Further, in testimony before the House committee last year, former NLRB General Counsel Rosemary Collyer described how the broadly defined whistleblower rights could be used as a weapon in the collective bargaining process:

> Let me give you an example. A union and an employer are engaged in negotiations for a collective bargaining agreement. The union representatives, in an effort to increase pressure on the employer to accept their demands, "disclose" to a local newspaper their "belief" that the "practice" of running machinery at the plant "evidences a violation" of the OSHA noise standards. The employees then strike in support of their collective bargaining demands. If the employer dares exercise its rights under the National Labor Relations Act and hire permanent replacements for the economic strikers, it would arguably violate the proposed bill by depriving its employees of reinstatement because, in part, they talked to the newspaper. The employer would owe extensive damages to the striking workforce and would have to prove by "clear and convincing" evidence that it would have replaced the strikers permanently even without the negative newspaper publicity. Of course, the bill would make it irrelevant that the noise

levels in the plant may not, in fact, violate any OSHA standard or that the employer was not given any opportunity to address the invalidity of the "belief." Unfortunately, this is but one example of the far-reaching, disruptive and unintended effect that the bill's definition could have.

2. *S. 436 would threaten the orderly operation of the workplace by creating a broad right to refuse to work.* The most radical and potentially disruptive provisions of the bill is the broad right provided to employees to refuse to work in certain situations. This right would exist where there is a violation of any federal health or safety law, no matter how minor the violation may be, or where the employee has a "reasonable apprehension" of serious injury to the employee, other employees, or the public. As previously noted, this provision would significantly expand the circumstances in which millions of workers, including those already covered by whistleblower laws, would be permitted to refuse to work with impunity.

It may be perfectly reasonable to provide a limited right of refusal to an employee faced with imminent death or serious injury to himself, as long as there is no reasonable alternative and the situation is sufficiently urgent to preclude elimination of the danger through normal channels. Indeed, no one is more apprehensive of threats to an employee's safety than the employee. Thus, it should be no surprise that this right of refusal is already provided to employees under the various workplace health and safety statutes—OSHA, MSHA, STAA, and the Railroad Safety Act.

Although the sponsors of the legislation attempt to cite these existing protections as precedent for the bill's right of refusal, the bill stretches that right into uncharted territory by allowing a refusal to work where the worker's safety is not being threatened. At that point, we believe that the employer—who faces potential civil and/or criminal liability attended by damaging negative publicity—can be presumed to be at least as apprehensive as the employee. The fact that only a small handful of whistleblower complaints are filed each year under the public health and safety laws demonstrate that these do not hold the same priority for employees as do the workplace health and safety laws.

The distruptive effect of such an expanded right of refusal to work cannot be overstated. The use of such a protection as a shield for ulterior motives poses an even greater danger than that provided for protected disclosures because it may well lead to a partial or total shutdown of an employee's operations, thus affecting not only the employee, but the entire workforce and the public as well.

The potential for disruption is maximized by the language of the right of refusal provision itself. As noted, the right would arise in two kinds of situations. First, an employee would have a right to refuse to work where the activity would violate a federal health or safety law. No distinction is made between serious violations and minor technical violations.

Thus, an employee who drives a truck which delivers apples from one state to another could refuse to make a delivery if one or more of those applies were not "practically free" from bruises or were more than 10 percent below the standard grade minimum size spec-

ified under the Apples in Interstate Commerce Act (21 U.S.C. Section 20), which may well be one of the many Federal safety and health laws that would be covered by this legislation.

Moreover, in that example, the determination as to whether the apples were in compliance with the Apples in Interstate Commerce Act would be made by the Department of Labor since the questions of whether the whistleblower law had been violated would hinge, in part, upon whether the Apple Act had been violated.

The bill's other right of refusal—a "reasonable apprehension" of serious injury—may appear to some to be reasonable but, in practice, would be even murkier. Unlike existing rights of refusal to work under current workplace health and safety laws, there is no requirement in this bill that a work stoppage be the only reasonable alternative. Moreover, there is no element of urgency to the danger, such that it could not be eliminated through normal channels. Finally, this bill expands the right of refusal to instances including public as well as worker safety.

The right of refusal provisions of the bill is offered with no record indicating that the absence of such a broad right has undermined those health and safety laws that contain whistleblower protections. Nor was it suggested by the Administrative Conference that such a right be incorporated in our whistleblower laws. Thus, we are asked to proceed with a substantial change in law which has a dramatic potential for the workplace without even a record demonstrating the need for such change.

3. *S. 436 would virtually eliminate a presumption of innocence on the employer's part.*

The procedures and remedies available under this bill also go well beyond typical whistleblower laws. They include immediate reinstatment pending adjudication, and an unjustifiable reallocation of the burdens of proof. These procedures attempt to tilt this bill so far in favor of those filing complaints that they establish unfair obstacles to employers who are simply making necessary personnel decisions.

The bill would do this first by requring immediate reinstatement of complainants who, prior to any adjudication, can show DOL investigators that there is "reasonable cause" to believe a violation has occurred.

What is frequently overlooked is that most cases involving employment discharges or discrimination are "mixed motive" cases. In other words, the employee is a member of a protected class or has engaged in protected activity and claims that that was the reason for the employment action. The employer, on the other hand, contends that there were legitimate reasons for the action, such as misbehavior or incompetence.

In such cases, there is always a very real possibility that the employee is simply using the law as a shield against an otherwise legitimate action. As has been noted by John L. Howard, former executive assistant to the chairman of the U.S. Merit Systems Protection Board:

> Not all employee reports of employer wrongdoing stem solely from considerations as pure as conscience. Irresponsible whistleblowing may be a device to mask incompe-

> tence or misconduct, seek revenge, or to oppose an organization's legitimate policy . . . It is important to underscore that inside witnesses are not always heroes or heroines and those who oppose them are not necessarily villains.

In a whistleblower case, it is very easy for the employee to establish that he or she "blew the whistle." Indeed, this bill requires a mere showing of disclosure or intent to disclose a practice that the employee "believes" to be a violation of a health and safety law. There need not even be a showing that that belief is a reasonable one.

It is not nearly as easy to ascertain why the employer took the action he or she did. An explanation that the employee was "incompetent," for example, may very well be a smokescreen, but determining whether it is legitimate requires examination of a multitude of factors and incidents which can only be adequately examined in a full-blown adversarial proceeding. Such factors will not likely be given adequate consideration in the context of a "reasonable cause" determination by a DOL investigator.

The irony is that, given the nature of the bill, it can be anticipated that those protected by it will frequently be employed in safety-sensitive positions, such as an airline pilot or a nuclear power plant engineer. The requirement of immediate reinstatement of such individuals, where it later turns out that their discharge was justified, could seriously jeopardize the health and safety of the public.

It is indeed unfortunate that those who are discriminated against, or lose their jobs in an illegal manner, must await the sometimes ponderous mechanisms of our legal system to be vindicated and made whole. But, in that case, they are no different from any other victims of civil law violations. It is simply the nature of our legal system to presume innocence on the part of the accused until our adjudicatory procedures have run their course. It is important to keep in mind that, if the victim prevails, he or she can be "made whole" with reinstatement, back pay, and legal fees. Indeed, the employer who knows there is a strong likelihood that the employee will prevail is likely to settle before allowing that "make whole" remedy to swell with time.

If, on the other hand, the employer ultimately prevails, but, in the meantime, has had to retain the employee in his or her position, there is no way to make that employer whole. All of the damage the employee had done to cause the initial discharge would be allowed to continue, frequently at the expense of other employees.

In addition to immediate reinstatement, the bill would prejudge the case further by establishing an enormous burden for the employer to prevail in "mixed motive" cases. All an employee has to do to win his or her case is to show by a "preponderance of the evidence" that any one of the innumerable activities protected by this bill was a "contributing factor" in the action taken against him. The burden then shifts to the employer to "prove by clear and convincing evidence" that the action would have been taken in any event.

This burden of proof standard contradicts well-established law in mixed motive cases under other employment law statutes. The pattern was established by the Supreme Court in *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274 (1977), where a teacher had been discharged, in part, for exercising his constitutional right of free speech. The *Mt. Healthy* standard has been embraced in Title VII cases by the Court in *Price Waterhouse* v. *Hopkins*, 109 S.Ct. 1775 (1989), where the Court specifically rejected the "clear and convincing" standard proposed by the bill. If anyone were to question the fairness of the *Mt. Healthy* standard, he or she need look no further than the *Price Waterhouse* case itself, where, on remand, the standard was applied and, as a result, the plaintiff was awarded a partnership in the prestigious accounting firm.

The bill's sponsors claim that this provision in the bill has precedent in the law enacted by Congress last year to bolster whistleblower protections for federal employees—the Whistleblower Protection Act of 1989 (P.L. 101-12). We simply point out that the laws protecting federal employees are an entirely different animal. For example, federal employees may form unions, but they may not strike. Yet, no one would seriously argue, for this reason, that private sector employees should be prevented from striking.

Moreover, a federal employee who blows the whistle is in a uniquely dangerous position. A private sector whistleblower may go to the state or federal enforcement agency with a complaint and assume that it will be handled objectively. A federal whistleblower, on the other hand, must proceed within the federal government itself, the very entity being accused of wrongdoing. Thus, the fact that it might make sense to create additional protections for federal employees in light of the overwhelming obstacles they might face in litigation, does not serve as a persuasive precedent for requiring similar protections in the private sector.

Finally, this recent change in the whistleblower statute, covering federal employees, followed many years of experience in federal whistleblower cases. There is no such record to justify a similar change in private employment law.

4. *S. 436 would undermine the integrity of the administrative process by providing a private right to sue in federal court.*

Despite the fact that such a provision has not been recommended by the Administrative Conference of the United States, the bill provides for an unprecedented private right of action in situations where the Department of Labor fails to meet the arbitrary enforcement timetables established under the bill.

Upon observing that no other existing federal whistleblower law provides such an option, Labor Secretary Elizabeth Dole, in an August 14, 1989, letter to the subcommittee, was highly critical of the private right of action:

> Affording complainants a cause of action before the conclusion of the administrative procedures would not serve the interests of the whistleblowers, employers, or the public, who can benefit from the well understood advantages provided by an administrative procedure. These advantages include, for example, a quicker, less burdensome and less costly procedure than is provided by judicial reso-

lution of claims. Moreover, a private right of action would increase the already heavy burdens of the Federal courts.

Again, with no precedent under existing federal whistleblower laws, and with no record to show why a private right of action is needed, this provision is included in S. 436.

5. *S. 436 would engender a proliferation of duplicative state and federal lawsuits by failing to preempt state laws.* Despite the fact that the bill is targeted toward violations of federal laws, this bill would allow plaintiffs to avail themselves of state laws as well, thus giving them several bites of the proverbial apple.

In fact, the growth of state whistleblower laws has occurred either through the "public policy" exception to the employment at will doctrine, adopted by nearly 40 states, or through separate state whistleblower laws, adopted in nearly twenty states. Indeed, there are fewer than ten states which do not provide any protections for whistleblowers, thus further narrowing the so-called "gaps" upon which this bill is allegedly premised.

Yet, as was underscored in an August 14, 1989, letter from Labor Secretary Dole to the committee, an explicit preemption of state whistleblower laws should be provided to avoid "duplicative state law proceedings."

In conclusion, we see no justification for proceeding with legislation of the scope and precedent offered by this legislation. If, indeed, genuine "gaps" exist in certain industries, we are not averse to closing those gaps in an appropriate manner. But to use the existence of those alleged "gaps" to slip through a blueprint for major revision in employment law is ambitious to a fault.

We, the undersigned, support the Minority Views to S. 436, "The Employer Health and Safety Whistleblower Protection Act."

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